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A Post-Millennial Inquiry into the United Nations Law of Self-Determination: A Right to Unilateral Non-Colonial Secession?

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ABSTRACT

The present Article inquires whether a right to unilateral non-colonial (UNC) secession is grounded in the United Nations (UN) law of self-determination. The Article argues that peoples subjected to deliberate, sustained, and systematic human rights abuses in extremis *(e.g., ethnic cleansing, mass killings, or genocide) by the existing state have an international customary law right to UNC secessionist self-determination. This right is coextensive with the "remedial-rights-only" philosophical approach to UNC secession. The Article further argues that in the post-millennial era two developments are likely for the law of UNC secessionist self-determination: first, the right will become available in response to human rights abuses* in moderato *(political, cultural, or racial discrimination); and second, in the much longer term, the right will become justified not only on remedial grounds but also on liberal philosophical bases. The latter development is predicted to parallel the increase in the number of liberal democratic governments throughout the twenty-first century.*

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I. INTRODUCTION

Without the direct and indirect effects of unilateral non-colonial (UNC) secession[1] the world's geopolitical map would appear decidedly different. States such as Bangladesh, Kosovo, or the other successor states to Yugoslavia, would likely not exist. Moreover, short of consensual secession, there would be no pathway for peoples within existing states to create new states.[2] UNC secession therefore performs an important evolutionary function in the state-centric international order: it is a primary method by which new states are created.

Despite its importance, UNC secession has the capacity to unleash widespread violence, as disputes such as those in Biafra, Bangladesh, Chechnya, and Kosovo have revealed. In order to neutralize this tendency, legal scholars and human rights advocates look to the jurisdiction of international law to provide a principled resolution to UNC secessionist disputes. Central to this is the law of self-determination, which empowers peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[3] Yet, exactly how the law of self-determination should be balanced against other international norms, such as state sovereignty and territorial integrity, remains a contentious issue. The balancing is by no means easy: self-determination is widely regarded as a peremptory norm (*jus cogens*),[4] and state sovereignty and territorial integrity are

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1. The definition of "secession" is discussed in Part II of the present Article. At this initial juncture, it can be observed that secession is a term of wide signification. It can be clarified according to whether it is colonial, non-colonial, consensual, or unilateral. Unilateral non-colonial (UNC) secession refers to the unilateral withdrawal of non-colonial territory from part of an existing state to create a new state. On the definition of secession, see generally Glen Anderson, *Secession in International Law and Relations: What Are We Talking About?*, 35 LOY. L.A. INT'L & COMP. L. REV. 343, 343–88 (2013).

2. This would apply even in cases of the most abject human rights abuses.

3. G.A. Res. 61/295, art. 3 (Sept. 13, 2007); G.A. Res. 2625 (XXV), principle 5, ¶ 1 (Oct. 24, 1970) (employing the nearly identical phraseology "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development"); G.A. Res. 1514 (XV), art. 2 (Dec. 14, 1960); International Covenant on Civil and Political Rights, art. 1(1), opened for signature Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, art. 1(1), opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), art. 1(1) (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 1(1) (Dec. 16, 1966). For a nearly equivalent scholarly characterization of self-determination, see D. B. Levin, *The Principle of Self-Determination in International Law*, SOVIET Y.B. INT'L L. 45, 46 (1962).

4. Peremptory norms (*jus cogens*) can be characterized as "compelling law" and can be juxtaposed with *jus dispositivum*, meaning law "subject to the dispensation of the

parties." As laid down by Article 53 of the 1969 Vienna Convention on the Law of Treaties, peremptory norms are immutable rules of international law that cannot be contravened, even by way of treaty. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 8–9 (2006). For those scholars who have asserted that self-determination is a peremptory norm, see DAVID RAIČ, STATEHOOD AND THE LAW OF SELF-DETERMINATION 289, 444 (2002); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA AND PRESENT STATUS 421 (1998); ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 140 (1995) ("[S]elf-determination constitutes a peremptory norm of international law."); Shana Tabak, *Aspiring States*, 64 BUFF. L. REV. 499, 525 (2016) ("[T]here exists general agreement that the right of peoples to self-determination is a norm of *jus cogens* . . . ."); Justin A. Evison, *Migs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of Uti Possidetis and Internationally Recognized Self-Determination*, 220 MIL. L. REV. 90, 98 (2014) ("[T]he right of self-determination can be considered *jus cogens*."); Ulf Linderfalk, *The Source of* Jus Cogens *Obligations - How Legal Positivism Copes with Peremptory International Law*, 82 NORDIC J. INT'L L. 369, 373–74 (2013); Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 807 (2009); Christian Leathley, *Gibraltar's Quest for Self-Determination: A Critique of Gibraltar's New Constitution*, 9 OR. REV. INT'L L. 153, 177 (2007) ("As a norm of *jus cogens* the right to self-determination has a status higher than any other in international law."); Alan Berman, *The Noumea Accords: Emancipation or Colonial Harness?*, 36 TEX. INT'L L. J. 277, 278 (2001); Manuel Rodriguez-Orellana, *Human Rights Talk . . . and Self-Determination, Too*, 73 NOTRE DAME L. REV. 1391, 1406 (1998) ("[T]he development of self-determination law has become part of *jus cogens* . . . ."); Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT'L & COMP. L. 201, 204 (1997) ("Today, the right to self-determination is considered jus cogens, and a part of customary international law that imposes binding obligations on all nation states."); Louis René Beres, *Self-Determination, International Law and Survival on Planet Earth*, 11 ARIZ. J. INT'L & COMP. L. 1, 1 n.2 (1994); Sam Blay, *Self-Determination: A Reassessment in the Post-Communist Era*, 22 DENV. J. INT'L L. & POL'Y 275 (1994) ("[S]elf-determination has emerged as an operative legal right in international law and has arguably acquired the status of *jus cogens*."); Katherine Doehring, *Self-Determination*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 70 (Bruno Simma ed., 1994) ("The right of self-determination is overwhelmingly characterized as forming part of the peremptory norms of international law."); James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131, 132 (1993) ("[I]t is frequently held that self-determination is a generally applicable norm of the highest order within the international system."); C. Parker & L. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 441 (1989) ("The right to self-determination . . . is a *jus cogens* norm."); Felix Ermacora, *Protection of Minorities before the United Nations*, 182 RECUEIL DES COURS 247, 325 (1983); H. Gros Espiell, *Self-Determination and Jus Cogens*, *in* UN LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 167–73 (A. Cassese ed., 1979); Henry J. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 190 (1978) ("The self-determination of peoples has evolved into a principle of international *jus cogens* . . . ."); ORAKHELASHVILI, *supra* note 4, at 51 ("The right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance."); *see also* Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain), Judgment, 1970 I.C.J. Rep. 304 (Feb. 5) [hereinafter *Barcelona Traction*] (separate opinion of Ammoun, J.) (describing the right of self-determination as an "imperative [rule] of law"). For scholars who argue against self-determination's peremptory status, see JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW 84 (2nd ed., 2014) [hereinafter SUMMERS, PEOPLES] ("[S]elf-determination [is] problematic

often nominated as the sacrosanct bases of the Westphalian system.[5] Trying to divine the legal limits of self-determination and the parameters of a right to UNC secession in international law is therefore inherently challenging.

The present Article inquires whether a right to UNC secession is grounded in the United Nations (UN) law of self-determination. Although it might be asserted that such an analysis is futile, owing to self-determination's nebulous and politically charged nature, the fact remains that the body of law emanating from the UN on such matters is the fulcrum around which legal argument pertaining to UNC secession has traditionally turned. This appears unlikely to change in the foreseeable future.

Moreover, a post-millennial inquiry into a right to UNC secession is apposite, as in the past there has been a reticence among legal scholars to acknowledge that such a right might exist.[6] Previous

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as a peremptory norm."); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE OF THE UNITED NATIONS 70 (1982) ("[I]f 'self-determination' is not really *jus* – or only very questionably so – it is difficult to see how it could be presumed to be *jus cogens*."); James Summers, *The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance?*, 14 FINNISH Y.B. INT'L L. 271, 287 (2003) [hereinafter Summers, *Status*] ("[A]lthough self-determination proposes that legal obligations which run counter to it are invalid, the idea that this can be explained by *jus cogens* is contradicted by the available evidence."); Mark D. Weisbrud, *The Emptiness of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 23–24 (1995); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 31 (1994) ("[I]t is debatable whether the right of self-determination is *jus cogens* . . . .").

5. *See generally* Sasson Sofer, *The Prominence of Historical Demarcations: Westphalia and the New World Order*, 20 DIPLOMACY AND STATECRAFT 1, 6–10 (2009) (detailing the Peace of Westphalia, concluded in 1648, which ended the Thirty Years' War in Europe and established the prevailing state based international order); Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569, 569–91 (1999).

6. *See, e.g.*, MALCOLM N. SHAW, INTERNATIONAL LAW 150 (7th ed. 2014) ("The best approach is to accept the development of self-determination as an additional criterion of statehood, denial of which would obviate statehood. This can only be acknowledged in relation to self-determination situations and would not operate in cases, for example, of secessions from existing states."); 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); Robert Trisotto, *Seceding in the Twenty-First Century: A Paradigm for the Ages*, 35 BROOK. J. INT'L L. 419, 431 (2010) ("[A] right to secession does not yet exist . . . ."); Johan D. van der Vyver, *The Right to Self-Determination and its Enforcement*, 10 ILSA J. INT'L & COMP. L. 421, 427 (2004) ("[T]he right of peoples to self-determination does not include a right to secession. Not even in instances where the powers that be act in breach of a minority's legitimate expectations.") [hereinafter van der Vyver, *Enforcement*]; Donald L. Horowitz, *A Right to Secede?*, *in* SECESSION AND SELF-DETERMINATION 50, 64 (Stephen Macedo & Allen Buchanan eds., 2003); Obiora Chinedu Okafor, *Entitlement, Process, and Legitimacy in the Emergent International Law of Secession*, 9 INT'L J. ON MINORITY & GROUP RTS. 41, 45 (2002); Johan D. van der Vyver, *Self-Determination of the*

analyses of UN instruments often evince the supposition that any violation of the principles of state sovereignty and territorial integrity is unthinkable, and that *a priori*, UNC secession is also unthinkable. Analyses steeped in such biases must be open to reconsideration. This is especially so given that in the recent *Kosovo Advisory Opinion*[7] several judges by way of *obiter* indicated affirmative support for a qualified right to UNC secession in international law.[8]

Peoples of Quebec Under International Law, 10 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, 22–23 (2000) [hereinafter van der Vyver, *Quebec*]; Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 198–99 (1999); Jermome Wilson, *Ethnic Groups and the Right to Self-Determination*, 11 CONN. J. INT'L L. 433, 464–65 (1996); Gregory H. Fox, *Self-Determination in the Post-Cold War World: A New Internal Focus?* 16 MICH. J. INT'L L. 733, 740 (1995); Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination, in* MODERN LAW OF SELF-DETERMINATION 118 (Christian Tomuschat ed., 1993) ("[I]nternational law is not a suicide club for states.").

7. Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 438 (July 22) (discussing the evolution of the right of self-determination, but not resolving the question).

8. *Id.* at 618, ¶¶ 11–12 (separate opinion of Yusuf, J.) (at ¶ 11 stating that, "[t]his does not . . . mean that international law turns a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of self-determination . . . but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context"); *id.* at 523, ¶¶ 182–84 (separate opinion of Cançado-Trindade, J.) (at ¶ 184 stating that, "[r]ecent developments in contemporary international law were to disclose both the external and internal dimensions of the right of self-determination of peoples: the former meant the right of every people to be free from any form of foreign domination, and the latter referred to the right of every people to choose their destiny in accordance with their own will, if necessary — in case of systematic oppression and subjugation — against their own government. This distinction challenges the purely inter-State paradigm of classic international law. In the current evolution of international law, international practice (of States and of international organizations) provides support for the exercise of self-determination by peoples under permanent adversity or systematic repression, beyond the traditional confines of the historical process of decolonization. Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation"). *But see id.* at 467, ¶¶ 21–25 (dissenting opinion of Koroma, J.) (at ¶ 22 stating that, "[n]ot even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent"). For a general discussion, see also Steven R. Fisher, *Towards Never Again: Searching for a Right to Remedial Secession under Extant International Law*, 22 BUFF. HUM. RTS. L. REV. 261, 291–93, 296 (2016); Stefan Oeter, *The Kosovo Case—An Unfortunate Precedent*, 75 HEIDELBERG J. INT'L L. 51, 54–56 (2015); Evan M. 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, 262–69 (2011); Alexander Orakhelashvili, *The International Court's Advisory Opinion on UDI in Respect of Kosovo: Washing Away the "Foam in the Tide of Time"*, 15 MAX PLANCK Y.B. U.N. L. 65, 65–104 (2011); Jure Vidmar, *The* Kosovo *Advisory Opinion Scrutinized*, 24 LEIDEN J. INT'L L. 355, 355–83 (2011); Thomas Burri, *The Kosovo Opinion and Secession: The*

This Article has five principal parts. Part II briefly introduces the concept of secession, establishing that it is applicable to the colonial and non-colonial context and may be either consensual or unilateral in nature. Part III examines the historical precursors to the modern law of self-determination. It argues that self-determination is a progressive concept, counterpoised to the divine right of kings and associated with popular revolution and anti-colonialism. Part IV analyzes relevant UN instruments and their collective implications for UNC secession. It demonstrates that the law of self-determination has slowly evolved from a mere principle, to a right of colonial peoples to unilateral colonial (UC) secession, to a qualified right to UNC secession for peoples subjected to deliberate, sustained, and systematic human rights abuses by the existing state. Part V considers the legal effects flowing from the potential recognition of a qualified right to UNC secession in declaratory General Assembly resolutions, particularly, the implications under international customary law. It argues that only human rights abuses *in extremis* (e.g., ethnic cleansing, mass killings, or genocide) are sufficient to trigger a *de lege lata* customary right to UNC secession. Part VI analyzes and critiques the philosophical orientation of the qualified right to UNC secession that emerges from the UN-based law of self-determination. Generally, it finds that current international law fits within the remedial-rights-only philosophical paradigm and eschews more liberal bases for UNC secession. The same Part also prognosticates that throughout the twenty-first century, the right of peoples to UNC secession will be increasingly influenced by liberal values, in line with the historically progressive trajectory of self-determination and the rise of liberal democratic governments.

The conclusion synthesizes all aspects of the preceding discussion and argues that the ongoing evolution of the law of self-determination beyond the colonial context is inevitable. Moreover, it is suggested that a dexterous approach is required when considering the interrelationship between the principles of state sovereignty, territorial integrity, and self-determination in the post-millennial era. Rather than reflexively championing the absolute supremacy of Westphalian sovereignty, it is incumbent upon contemporary legal scholars to consider how UNC secession might be more appropriately and realistically incorporated into international law and geopolitics. Consideration of these issues will ensure—as much as possible—the

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Sounds of Silence and Missing Links, 11 GERMAN L. J. 881, 881–89 (2010); Mindia Vashakmadze & Matthias Lippold, *Nothing but a Road Towards Secession? - The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2 GOETTINGEN J. INT'L L. 619, 619–48 (2010).

legally based and nonviolent resolution of UNC secessionist disputes in the twenty-first century and beyond.

II. SECESSION

The etymological origins of the word "secession" lie in a combination of the Latin terms *se*, meaning "apart," and *cedere*, meaning "to go."[9] In the context of international law and relations, "secession" refers to "the withdrawal of territory (colonial or non-colonial) from part of an existing state to create a new state."[10] "Secession" is therefore a word of wide signification. The process and outcome of creating a new state is subsumable under the concept of "secession" whenever an endogenously motivated withdrawal occurs.[11] "Withdrawal" refers to a physical process, namely, the withdrawal of territory from the existing state. However, it also refers to a legal process, namely, the withdrawal of sovereignty over that territory and the creation of a new state.[12] Because all secessions are underpinned by a change of sovereignty, secession can occur consensually or unilaterally over colonial or non-colonial territory. Consensual secession is a relatively uncontroversial process, as there is no disagreement between the territory seceding and the existing state; the process of withdrawal, be it constitutionally or politically based, is entirely amicable.[13] Nor is UC secession controversial: it has long been recognized that the occupation and subjugation of foreign peoples is contrary to international law.[14] The major area of controversy relates

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9. Anderson, *supra* note 1, at 345.
10. *Id.* at 344, 386–88.
11. *Id.* at 346.
12. *Id.* at 346–49.
13. *Id.* at 350–53.
14. For scholars who assert that secession can occur in a colonial context, see JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 330, 375 (2nd ed., 2006); FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 235 (2003) (noting that "as a rule, States and international organizations continue to be hostile to the exercise of a right of secession other than in situations of decolonization or foreign domination or occupation"); THOMAS MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 181 (1997) (defining "secession" as "the antithesis of territorial integrity. It occurs when part of an independent state or non-self-governing territory separates itself from the whole to become an independent state"); HANNA BOKOR-SZEGÖ, THE ROLE OF THE UNITED NATIONS IN INTERNATIONAL LEGISLATION 53 (1978) (stating that self-determination "comprise[s] the right to secede from the administering power"); INGRID DETTER DE LUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 15 n.14 (Gower Publishing Company 2nd ed., 1987) (1974) ("[S]elf-determination is not merely concerned with the rights of the citizens in one country to organize their government as they wish. It also implies the right of secession from colonial rule."); Iñigo Urrutia Libarona, *Territorial Integrity and Self-Determination: The Approach of the International Court of Justice in the Advisory Opinion on Kosovo* 16

to UNC secession. This stems from two factors: first, in any UNC secessionist dispute there is a lack of unanimity between the existing state and secessionist territory, which creates a clash of sovereignties; and second, outside of the "saltwater" context of colonial territories, the principles of state sovereignty and territorial integrity have been regarded as relatively sacrosanct.

III. SELF-DETERMINATION

The law of self-determination is inextricably linked with the right of peoples to UNC secession. Before examining the possible bases of a legal right to UNC secession in UN instruments, it is thus useful to briefly consider from where, and the reasons why, the law of self-determination arose.

The genesis of what is now referred to as "self-determination"[15] is essentially contested.[16] A possible starting point might be indigenous

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REVISTA D'ESTUDIS AUTONÒMICS I FEDERALS, 107, 124 (2012); Peter Radan, *Secessionist Referenda in International Law and Domestic Law*, 18 NATIONALISM & ETHNIC POL. 8, 9 (2012); Ronald Thomas, *The Distinct Cases of Kosovo and South Ossetia: Deciding the Question of Independence on the Merits of International Law*, 32 FORDHAM J. INT'L L. 1990, 1994–95 (2009) ("[The UN] has not ruled out secession in colonial contexts."); Joshua Castellino, *Territorial Integrity and the "Right" to Self-Determination: An Examination of the Conceptual Tools*, 33 BROOK. J. INT'L L. 503, 515 (2008); Peter Radan, *Secession: A Word in Search of a Meaning*, *in* ON THE WAY TO STATEHOOD: SECESSION AND GLOBALISATION 18 (Aleksandar Pavković & Peter Radan eds., 2008) (defining "secession" as "the creation of a new State upon territory previously forming part of, or being a colonial entity of, an existing State"); Malcolm N. Shaw, *The Role of Recognition and Non-Recognition with Respect to Secession: Notes on Some Relevant Issues*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE – REGIONAL APPRAISALS 245 (Julie Dahlitz ed., 2003) (alluding to "secessions arising out of the decolonisation process . . ."); Christine Haverland, *Secession*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, VOL. IV 354–55 (Rudolf Bernhardt ed., 2000) (stating that "both the separation of a former dependent territory . . . and the separation of an integral part of a unitary state are secessions"); Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objection and Responses*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 54 (Pekka Aiko & 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); Anderson, *supra* note 1, at 373–79.

15. The word "self-determination" is derived from the German term *selbstbestimmung*, which was popularized during the Enlightenment and referred to the connections between reason, individuation, and emancipation. U. O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 3 (1972); Eric D. Weitz, *Self-Determination: How a German Enlightenment Idea Became the Slogan of National Liberation and a Human Right*, 120 AM. HIST. REV. 462, 469 (2015); Borislav Chernev, *The Brest-Litovsk Moment: Self-Determination Discourse in Eastern Europe before Wilsonianism*, 22 DIPLOMACY AND STATECRAFT 369, 370 (2011).

16. Meaning that it is susceptible to irresolvable debate. On the related notion of an "essentially contested concept," see Walter Bryce Gallie, *Essentially Contested Con-*

hunter-gatherer societies in which the clan had collective input into decision making, law creation, and leadership.[17] Alternatively, it might be postulated that self-determination arose with the Greek city-state and *demos kratos*,[18] whereby citizens (male and property-owning) politically coalesced and determined their collective destiny.[19] Other starting points might include Marsilius of Padua, a fourteenth century Italian scholar who suggested that the consent of the people was necessary to legitimize the powers of a ruler,[20] or Stanisław of Skarbimierz, a fifteenth century Polish scholar and the President of the Cracow Academy who postulated the then-progressive view that non-Christian peoples were entitled to their own independence.[21]

The contemporary doctrine of self-determination can be traced to several key historical influences: the Glorious Revolution, the American Revolution, the French Revolution, the political theories of Vladimir Lenin, and the democratic ideals of U.S. President Woodrow Wilson. These are briefly discussed below.

A. *The Glorious Revolution*

In the Glorious Revolution of 1688–1689 the English monarch, James II, who ruled by the divine right of kings, was removed from

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cepts, 56 PROC. ARISTOTELIAN SOC'Y 167, 184 (1956). *See also* Andrew Mason, *On Explaining Political Disagreement: The Notion of an Essentially Contested Concept*, 33 INQUIRY 81, 81–98 (1990); Eugene Garver, *Rhetoric and Essentially Contested Arguments*, 11 PHIL. & RHETORIC 156, 156–72 (1978) (comparing Gallie's essentially contested concepts with Aristotle's rhetorical argument).

17. In the American context, the contributions of the Iroquois have been particularly well noted. For this example, see Bruce E. Johansen, *Native American Societies and the Evolution of Democracy in America, 1600-1800*, 37 ETHNOHISTORY 279, 279–90 (1990); Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323, 323–31 (1988).

18. For more information on the history of *demos kratos*, see generally D. F. M. Strauss, *The Cultural and Philosophical Underpinnings of the Ancient Greek Idea of the State*, 32 POLITEIA 45, 45–57 (2005); Paul Veyne, *Did the Greeks Know Democracy?*, 34 ECON. & SOC'Y. 322, 322–45 (2005); Dolf Sternberger, *Ancient Features of the Modern State*, 5 HIST. OF EUROPEAN IDEAS 225, 225–35 (1984); H. Clay Jent, *Demos Kratos: Democracy, Old and New*, 58 SOC. STUD. 242, 242 (1967).

19. UMOZURIKE, *supra* note 15, at 4.

20. Juha Salo, *Self-Determination: An Overview of History and Present State with Emphasis on the CSCE Process*, 2 FINNISH Y.B. INT'L L. 268, 275 (1991); S. Prakash Sinha, *Is Self-Determination Passé?*, 12 COLUM. J. TRANSNAT'L L. 260, 260–61 (1973).

21. Janusz Symonides, *The Polish Initiative on the Preparation of Societies for Life in Peace*, 10 POLISH Y.B. INT'L L. 7, 7 (1980); Przetacznik, *supra* note 14, at 56.

office[22] and replaced by Parliament.[23] The unofficial philosophical basis for the Revolution was found in John Locke's *Two Treatises of Government*, which posited that government was a trust instituted for the benefit of citizens and attended with their consent.[24] The overriding aims of government were to preserve the physical integrity of citizens, their liberties, and their property.[25] Locke argued that if government violated these basic principles it would become illegitimate, and citizens could then establish a new government to achieve these ends.[26] Such changes, however, were only justified following "a long train of abuses."[27] Something more than "great mistakes in the ruling part, many wrong and inconvenient laws, and . . . slips of human frailty" was required.[28]

Despite its conservative nature, the Glorious Revolution and Locke's counterpart philosophical contributions challenged the divine right of kings and paved the way for representative government.[29] In this sense, the Revolution was an early progenitor of modern self-determination, even if it was as yet unrecognizable through modern eyes.

B. *The American Revolution*

The American Revolution of 1776 was another important influence on self-determination.[30] The Revolution's origins lay in latent

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22. *See generally* W. A. Speck, *The Orangist Conspiracy Against James II*, 30 HIST. J. 453, 453–62 (1987) (James II fled England in the face of a Protestant invasion army from the Netherlands led by William of Orange, and was held by Parliament to have abdicated).

23. Ulrich Niggemann, *Some Remarks on the Origins of the Term 'Glorious Revolution'*, 27 THE SEVENTEENTH CENTURY 477, 477–87 (2012); George Harrison, *Prerogative Revolution and Glorious Revolution: Political Proscription and Parliamentary Undertaking, 1687–1688*, 10 PARLIAMENTS, ESTATES AND REPRESENTATION 29, 29–43 (1990); SUMMERS, PEOPLES, *supra* note 4, at 142.

24. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, THE SECOND TREATISE ch. VIII § 104, ch. IX § 123 (Thomas Cook ed., Hafner Publishing Co. 1947) (1690); Lois G. Schwoerer, *Locke, Lockean Ideas, and the Glorious Revolution*, 51 J. HIST. IDEAS 531, 535 (1990); *see also* SUMMERS, PEOPLES, *supra* note 4, at 142–43.

25. SUMMERS, PEOPLES, *supra* note 4, at 143; LOCKE, *supra* note 24, ch. VII § 94, ch. VIII § 95.

26. LOCKE, *supra* note 24, ch. XIII § 149, ch. XIX, § 221–22, 243.

27. *Id.* at ch. XIX, § 225; *see also* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (representing the same sentiment).

28. LOCKE, *supra* note 24, ch. XIX § 225.

29. *See generally* Gerald Straka, *The Final Phase of Divine Right Theory in England, 1688–1702*, LXXVII ENG. HIST. REV. 638, 638–58 (1962) (emphasizing that the Glorious Revolution did not entirely remove the divine right of kings from English society).

30. James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L. J. 209, 212–13 (1991); Przetacznik, *supra* note 14, at 62. For a

tension between Westminster and her thirteen American colonies over the imposition of taxation (stamp duty) without direct political representation. Relations between the two sides were further strained after the Boston Tea Party in December 1773, in which a consignment of British tea was thrown into Boston Harbor in protest against British tea revenue measures.[31] Subsequent skirmishes between patriot militias and British regular forces culminated in full-scale war in the Battles of Lexington and Concord in April 1975. By April 1776, General George Washington of the newly formed continental army had won control of the thirteen colonies from the British. On July 4, 1776, the Declaration of Independence was adopted by the Continental Congress at Philadelphia, proclaiming the United States of America. The Declaration espoused various themes, all of which resonate with the contemporary doctrine of self-determination:

> When in the course of human events, it becomes necessary for one people to dissolve the political bonds which had connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving the just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.[32]

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succinct recent account of the factors leading to the American Revolution, see Gregg Frazer, *The American Revolution: Not a Just War*, 14 J. MIL. ETHICS 35, 35–56 (2015). On potential commonalities between the Glorious and American Revolutions, see Andrei Kreptul, *The Constitutional Right of Secession in Political Theory and History*, 17 J. LIBERTARIAN STUD. 39, 63 (2003).

31. *See generally* PETER DAVID GARNER THOMAS, TEA PARTY TO INDEPENDENCE: THE THIRD PHASE OF THE AMERICAN REVOLUTION, 1773–1776 (1991); B. W. LABAREE, THE BOSTON TEA PARTY (1964).

32. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

The Declaration of Independence thus repudiated the divine right of kings and held that citizens were entitled to recast their polity in order to ensure life, liberty, and the pursuit of happiness.[33] This right was governed by reason, however: simply abolishing one government and replacing it with another may be inappropriate when confronted with transient problems. Instead, it may be better to reform the current government from within.[34]

Nonetheless the American Revolution did auger a new emphasis on constitutionality and constitutional renewal. The Revolution's chief intellectual, Thomas Jefferson,[35] stated that "some men look at constitutions with sanctimonious reverence, and deem they are like the arc of the covenant, too sacred to be touched . . . let us provide in our constitutions for its revision at stated periods."[36] This stemmed from Jefferson's view that the political compacts of older generations should not irrevocably bind the living.[37]

The American Revolution thus added a progressive constitutionally based aspect to self-determination. The conservative shackles of the Glorious Revolution, which only viewed political change as a remedy of very last resort, were perhaps slightly relaxed.

C. *The French Revolution*

The French Revolution of 1789 also contributed to the modern formulation of self-determination. The Revolution's origins lay in a power tussle between the French monarch, Louis XVI, and the nobility. Facing grain shortages and economic dislocation,[38] in August 1788 the King convoked the Estates General (*États généraux*), consisting of the

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33. RAIČ, *supra* note 4, at 173; Falkowski, *supra* note 30, at 213.

34. Robert McGee, *Secession and Emerging Democracies: The Kendall and Louw Solution*, 2 J. INT'L L. & PRACTICE 321, 327 (1993).

35. *See* FAWN BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY 121 (1974) (stating that Jefferson was selected to draft the Declaration of Independence from a committee of five due to his unique ability with words).

36. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (cited in Falkowski, *supra* note 30, at 215 n.35).

37. DANIEL BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 207, 211 (1948); *see* Robert W. McGee, *Secession Reconsidered*, 11 J. LIBERTARIAN STUD. 11, 17 (1994).

38. JACK R. CENSER & LYNN HUNT, LIBERTY, EQUALITY, FRATERNITY: EXPLORING THE FRENCH REVOLUTION 8–9 (2004); D. M. G. SUTHERLAND, FRANCE 1789-1815 REVOLUTION AND COUNTERREVOLUTION 54–56, 58, 61–62 (1985); Catherine Packham, *"The Common Grievance of the Revolution": Bread, the Grain Trade, and Political Economy in Wollstonecraft's View of the French Revolution*, 25 EUR. ROMANTIC REV. 705, 705–22 (2014); Olwen Hufton, *Social Conflict and the Grain Supply in Eighteenth-century France*, 14 J. INTERDISC. HIST. 303, 303–31 (1983); George E. Rudé, *The Outbreak of the French Revolution*, 8 PAST AND PRESENT 28, 34 (1955).

nobility, clergy, and the Third Estate (middle classes).[39] A three-way power struggle ensued, and in June 1789, the Third Estate renamed itself the National Assembly and sought the King's support against the nobility. The King ultimately backed the nobility, and revolution was unleashed in Paris which culminated in the Third Estate taking control of the government.[40] On August 26, 1789, the Declaration of the Rights of Man and the Citizen (*Declaration des droit de l'homme et citoyen*) was adopted, Article III of which proclaimed that "[t]he nation is essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it." The Declaration was complemented in 1794 by a revolutionary decree stating that "all men, without distinction of colour, domiciled in the French colonies, are French citizens and enjoy all the rights assured by the Constitution."[41]

These events were a further blow to the divine right of kings, reinforcing the progressive ideal that the government should be responsible to the people.[42] This was reflected by the Revolution's unofficial philosopher, Jean-Jacques Rousseau,[43] who argued that an individual's submission to the general will of the people as a whole ensured that citizens were emancipated from governmental tyranny.

Despite such beginnings, French self-determination gradually came to be applied more in relation to the acquisition of territory than internal democratic reform.[44] In 1790, for instance, the principle was applied to justify France's annexation of Alsace, on the grounds that a plebiscite conducted throughout the region favored French takeover. Self-determination was similarly used in 1791 to justify France's annexation of the papal enclaves of Avignon and Comtat Venessin.[45]

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39. Such a convention had not occurred for 174 years. *See* IAN DAVIDSON THE FRENCH REVOLUTION: FROM ENLIGHTENMENT TO TYRANNY 28 (2016) ("The *États généraux* was an antiquated and long-neglected national advisory institution that had been created nearly 500 years earlier, in 1302; its meetings had become infrequent and its function uncertain and unreliable."); NOAH SHUSTERMAN, THE FRENCH REVOLUTION 18, 21, 26–32 (2013); WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 85 (2nd ed., 2002).

40. SUMMERS, PEOPLES, *supra* note 4, at 149.

41. Martin D. Lewis, *One Hundred Million Frenchmen: The "Assimilation" Theory in French Colonial Policy*, 4 COMP. STUD SOC. & HIST. 129, 134 (1962); UMOZURIKE, *supra* note 15, at 10.

42. *See* RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE 17–18 (1973) ("The history of self-determination is bound up with the doctrine of popular sovereignty proclaimed by the French Revolution.").

43. UMOZURIKE, *supra* note 15, at 9–10.

44. Peter M. R. Stirk, *The Concept of Military Occupation in the Era of the French Revolutionary and Napoleonic Wars*, 3 COMP. LEGAL HIST. 60, 66 (2015).

45. Edward James Kolla, *The French Revolution, the Union of Avignon, and the Challenges of National Self-Determination*, 31 LAW & HIST. REV. 717, 720 (2013); J. A.

The principle was again employed in 1793 to justify the (repressive) French takeover of Belgium and the Palatinate.[46] Moreover, the "citizens" of French colonies were deprived of the right to decide whether they would prefer independence.[47] Self-determination was thus pragmatically deployed by the French state as both a sword and a shield.

Notwithstanding these criticisms, the French Revolution made an important contribution to the development of self-determination: it further eroded the divine right of kings and empowered citizens to democratically participate within their chosen system of government.

D. *Leninist Self-Determination*

Lenin developed his conceptualization of self-determination throughout the early twentieth century in *Postulates on the National Question* and *On Imperialism*.[48] Generally, Lenin's views on self-determination, and those of his socialist contemporaries, can be divided into three strands.[49] First, self-determination could be utilized by nationalist groups to freely determine their political destiny, which, by necessity, included a right to UNC secession. Second, self-determination could be invoked in the aftermath of military conflicts between sovereign states to allow the citizens of conquered territories to determine by whom they would like to be ruled. Third, self-determination could be anti-colonial, intended to expedite the freedom and political independence of colonial peoples.[50] Evidently, the second strand of Leninist thought mirrored the advances made during the French Revolution, and was not therefore particularly novel. The first and third strands, however—allowing nationalist groups to freely determine their political destiny, including a right to UNC secession, and outlawing colonialism—were, at the time, new developments.[51]

In relation to the first strand—allowing ethnic or national groups to freely determine their political destiny, including a right to UNC

Laponce, *National Self-Determination and Referendums: The Case for Territorial Revisionism*, 7 NATIONALISM & ETHNIC POL. 33, 38 (2001); UMOZURIKE, *supra* note 15, at 10–11.

46. ALEXANDER GRAB, NAPOLEON AND THE TRANSFORMATION OF EUROPE, 2–4 (2003); CASSESE, *supra* note 4, at 12; SUMMERS, PEOPLES, *supra* note 4, at 151; SUREDA, *supra* note 42, at 18.

47. CASSESE, *supra* note 4, at 12–13.

48. *Id.* at 15; *see* ANTON PELINKA & DOV RONEN, THE CHALLENGE OF ETHNIC CONFLICT, DEMOCRACY AND SELF-DETERMINATION IN CENTRAL EUROPE 48 (2013) (stating in *Postulates on the National Question*, that Lenin underscored, "the right of every nation to self-determination and even to secession from Russia").

49. CASSESE, *supra* note 4, at 16.

50. *Id.*

51. *Id.*

secession—Lenin envisioned that plebiscites would facilitate the orderly and peaceful transfer of political power.[52] The same plebiscites would also be used to resolve any subsequent territorial disputes. Lenin did not, however, support a world fragmented along ethnic and nationalist divides. Rather, he felt that federation was the initial answer, which would lead to the "inevitable integration of nations."[53] As Lenin wrote,

> [i]n the same way as mankind can arrive at the abolition of classes only through a transition period of the dictatorship of the oppressed class, it can arrive at the inevitable integration of nations only through a transition period of the complete emancipation of all oppressed nations, i.e. their freedom to secede.[54]

In reality though, the right to national self-determination was denied within Soviet Russia when it clashed with the goal of revolution. In 1916, for example, Lenin emphasized "the necessity to subordinate the struggle for the demand [of national self-determination] and for all the basic demands of political democracy, directly to the revolutionary mass struggle for the overthrow of the bourgeois governments and for the achievement of socialism."[55] The desire of nations for self-determination was thus subordinated to the ultimate political objective: socialism. This was reflected in subsequent Soviet constitutions, which, although providing a right to secession for member republics, attached so many conditions that it was virtually impossible to exercise.[56] The first strand of Leninist self-determination was therefore only advocated so long as it furthered class struggle, tending to indicate that the principle was primarily employed as a strategic tool.[57]

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52. *Id.* at 17.

53. WALKER CONNOR, THE NATIONAL QUESTION IN MARXIST-LENINIST THEORY AND STRATEGY 47 (1984); CASSESE, *supra* note 4, at 17. *See generally* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 26 (2002); Stanley W. Page, *Lenin and Self-Determination*, 28 SLAVONIC & E. EURO. REV. 342, 354 (1950) (arguing that Lenin advocated for the right of secession, but he actually desired a unitary state).

54. CASSESE, *supra* note 4, at 17. On this point see also the erudite remarks of CHRISTOPHER HILL, LENIN AND THE RUSSIAN REVOLUTION 141 (1957).

55. CASSESE, *supra* note 4, at 18; *see also* GLEB STARUSHENKO, THE PRINCIPLE OF NATIONAL SELF-DETERMINATION IN SOVIET FOREIGN POLICY 64–69 (1963).

56. *See* KONSTITUTIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION], art. 72–85; KAZIMIERZ GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW 129–36 (1970); Blay, *supra* note 4, at 285–86 ("For all practical purposes, the right of self-determination as such did not exist under the Soviet Constitution or its legal system."); Kreptul, *supra* note 30, at 69–70 (arguing that the right to secession in the Soviet Constitution "had no practical effect because the USSR was governed as a de facto unitary state"); RADAN, *supra* note 53, at 26 ("Although all Soviet constitutions explicitly recognised the right of federal republics to secede, this right was interpreted as purely theoretical.").

57. *See* CASSESE, *supra* note 4, at 18; RADAN, *supra* note 53, at 25–26; *see also* OSCAR I. JANOWSKY, NATIONALITIES AND NATIONAL MINORITIES 69–104 (1945) (arguing

The third strand of Leninist self-determination—the granting of sovereign independence to colonial peoples—enjoyed stronger practical support from Soviet policymakers, a factor no doubt explicable by the confluence of pragmatic and ideological concerns. A letter by Soviet Foreign Minister Georgy Chicherin to Lenin in 1922 is instructive on this point:

> The World War has resulted in the intensification of the liberation movement of all oppressed and colonial peoples. World States are coming apart at the seams. Our international programme must bring all oppressed colonial peoples into the international scheme. The right of all peoples to secession [to shake off the colonial yoke] or to home rule must be recognized . . . . The novelty of our plan must be that the Negro and all other colonial peoples participate on an equal footing with European peoples in the conferences and commissions and have the right to prevent interference in their internal affairs.[58]

Of the three strands of Leninist self-determination, opposition to colonialism exerted the most influence on international law and relations during the twentieth century. In the space of some fifty years, colonialism was transformed from an unremarkable and acceptable practice into an embarrassing and illegal one.[59] Without the consistent support of the Soviet Union, this transformation would likely have been much delayed.[60]

E. *Wilsonian Self-Determination*

Concurrent with Lenin's elaboration of self-determination, U.S. President Woodrow Wilson promulgated his own interpretation. Unlike Lenin, who was wedded to socialist political philosophy, Wilson developed his ideas in the crucible of Western democracy. Wilson thus came to view self-determination as encompassing the notion that governments must be based on "the consent of the governed." Citizens were therefore to have a direct and meaningful input into who would represent them. In many respects, Wilson's interpretation was a

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that the Soviet Union did recognize national, cultural, and linguistic rights in a meaningful way); Urs W. Saxer, *The Transformation of the Soviet Union: From a Socialist Federation to a Commonwealth of Independent States*, 14 LOY. L.A. INT'L & COMP. L. REV. 581, 615–17 (1992).

58. CASSESE, *supra* note 4, at 16; *see* V. I. LENIN, ON THE FOREIGN POLICY OF THE SOVIET STATE 11 (1968).

59. *See* G.A. Res. 1514, *supra* note 3 ("[T]he continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace.").

60. *See* CASSESE, *supra* note 4, at 19 (stating that the Soviet Union played a large role in ensuring anti-colonialism was incorporated into international law); Salo, *supra* note 20, at 275 (arguing that the extension to colonies was the most important facet of self-determination in Soviet doctrine).

natural extension of the views propagated during the American and French Revolutions, namely, that governments should be responsible to the people—not vice versa.[61]

With the passage of World War I, however, Wilson's interpretation of self-determination underwent a series of permutations. In a manner reminiscent of the French Revolution, he advocated for the right of peoples to decide under which government they would live post-World War I. People were not to be "bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game."[62] People should not be assigned "to a sovereignty under which [they do] not care to live."[63] Central to this view was the idea that nations should be able to enjoy independent statehood.[64] When the Ottoman and Turkish empires were divided post-World War I, for instance, the peoples of these territories were to be consulted, with meaningful regard to national concentrations. Furthermore, "[e]very territorial settlement [after the completion of World War I was to] be made in the interests and for the benefits of the populations concerned, and not as a part of any mere adjustment or compromise of claims among rival states."[65]

Gradually Wilson came to downplay this particular aspect of self-determination, realizing it was antithetical to the post-war *real-politik* concerns of punishing enemies and rewarding allies.[66] He may also have been encouraged to distance himself from these comments due to their potential to support both UC and UNC secessionist claims. Wilson's Secretary of State, Robert Lansing, for instance, commented as follows:

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61. *See* Betty Miller Unterberger, *The United States and National Self-Determination: A Wilsonian Perspective*, 26 PRESIDENTIAL STUD. Q, 926, 930 (1996) (describing Wilson as a proponent of self-government). *See generally* Weitz, *supra* note 15, at 485 ("President Wilson, fearful that the Bolshevik promise of self-determination would reverberate throughout Europe . . . went to a different well than did Lenin, the long tradition of Anglo-American political philosophy going back to Locke and Mill. For Wilson, self-determination meant free white men coming together consensually to form a democratic political order.").

62. CASSESE, *supra* note 4, at 20.

63. *Id.* at 20 n.26.

64. RADAN, *supra* note 53, at 26–27.

65. CASSESE, *supra* note 4, at 20; *see also* Philip Marshall Brown, *Self-Determination in Central Europe*, 14 AM J. INT'L L. 207, 237 (1920) (arguing that in the case of Austria-Hungary, the Peace Conference failed to unite behind the purpose of meting out justice based on equal rights for the several peoples concerned); RADAN, *supra* note 53, at 27.

66. Hannum, *supra* note 4, at 4; SUREDA, *supra* note 42, at 21; RADAN, *supra* note 53, at 27; *see* Allen Lynch, *Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration*, 28 REV. INT'L STUD. 419, 432–33 (2002) (asserting that Wilson saw many cases where the principle of self-determination had to be downplayed for practical reasons).

> The more I think about the President's declaration as to the right of "self-determination", the more convinced I am of the dangers of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands . . . and create trouble in many lands.
>
> What effect will it have on the Irish, the Indians, the Egyptians and the nationalists among the Boers? Will it not breed discontent, disorder and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli rely on it? How can it be harmonized with Zionism, to which the President is practically committed?
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> The phrase is simply loaded with dynamite. It will raise hopes that can never be realized. It will, I fear, cost thousands of lives . . . . What a calamity the phrase was ever uttered! What a misery it will cause![67]

Wilson also came to view self-determination as important for the settlement of post-war colonial claims. Significantly though, he stopped short of adopting Lenin's position that all colonies should be entitled to sovereign independence. Instead, Wilson championed "orderly liberal reformism,"[68] which, due to its amorphous nature, would allow—for the time being—Western states to continue their economic and political subjugation of colonial territories.

F. *Conclusion*

The historical influences outlined above generate a number of conclusory points *vis-à-vis* self-determination. First, the concept is one that is opposed to the divine right of kings. This means that generally the concept connotes political rule from the bottom-up, so to speak, rather than the top-down. Autocratic, despotic, dictatorial, and elitist political systems are thus opposed to self-determination's philosophical essence.[69] Second, self-determination does not imply conservatism, in the sense that political units, once cast, must be precluded from evolution. This is particularly evident in the contributions from the Glorious, American, and French Revolutions. Third, and inversely to the foregoing point, self-determination is a progressive force that has challenged the political status quo throughout history. In the twentieth century, this culminated in the movement against colonialism and ultimately, international recognition of the legality of UC secession. Fourth, self-determination is of enduring significance and, like a

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67. ROBERT LANSING, THE PEACE NEGOTIATIONS – A PERSONAL NARRATIVE 87 (1921).

68. N. GORDON LEVIN, JR., WOODROW WILSON AND WORLD POLITICS: AMERICA'S RESPONSE TO WAR AND REVOLUTION 247 (1968).

69. For a more extended consideration of the interlinkages between self-determination and "democracy" see Glen Anderson, *Unilateral Non-Colonial Secession and Internal Self-Determination: A Right of Newly Seceded Peoples to Democracy?*, 34 ARIZ. J. INT'L & COMP. L. (forthcoming 2017).

philosophical genie which has escaped its bottle, is unlikely to be expunged from the international legal landscape. Much more likely is that self-determination will continue to be developed, particularly in the context of a right to UNC secession in international law.

IV. A RIGHT TO UNC SECESSION IN INTERNATIONAL LAW: ANALYSIS OF UNITED NATIONS INSTRUMENTS

Having outlined the principal historical waypoints of self-determination, it is now apposite to determine whether the contemporary law of self-determination, as expressed in relevant UN instruments, provides peoples with a right to UNC secession.

When examining the parameters of self-determination in the UN instruments that follow, normal canons of interpretation will be employed. Whenever possible, key words and phrases will be 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 Vienna Convention on the Law of Treaties (Vienna Convention).[70] When key words and phrases remain "ambiguous or obscure," recourse 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).[71]

Instruments analyzed include the UN Charter, the Declaration on the Granting of Independence to Colonial Countries and Peoples,[72] the International Covenant on Economic, Social and Cultural Rights,[73] the International Covenant on Civil and Political Rights,[74] the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[75] the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations,[76] and the United Nations Declaration on the Rights of Indigenous Peoples.[77]

Before undertaking an analysis of UN instruments and UNC secessionist self-determination, however, one issue requires brief

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70. *See* Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 380–83 (Clarendon Press 8th ed., 2012); RADAN, *supra* note 53, at 31.

71. RADAN, *supra* note 53, at 31 nn.28, 30; CRAWFORD, *supra* note 70, at 383–84.

72. G.A. Res. 1514, *supra* note 3.

73. G.A. Res. 2200, *supra* note 3.

74. *Id.*

75. G.A. Res. 2625, *supra* note 3.

76. G.A. Res. 50/6 (Nov. 9, 1995).

77. G.A. Res. 61/295, *supra* note 3.

consideration, namely, the meaning of "peoples." Although there is no definitive legal definition of "peoples," three propositions can be reasonably inferred from relevant UN instruments: first, that "peoples" are not restricted to the colonial context;[78] second, that more than one "people" can inhabit a non-self-governing territory[79] and sovereign state;[80] and third, that "peoples" should have what might be loosely termed "national overtones," in the sense that they should have some common group identity.[81] The latter point, however, should not

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78. Various reasons support this assertion. The UN Charter's preamble begins with the phrase, "[w]e the peoples of the United Nations" and concludes by pledging the organization to the "economic and social advancement of all peoples." Article 1(2) continues that one of the UN's purposes is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Common Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200, *supra* note 3) and the International Covenant on Civil and Political Rights (G.A. Res. 2200, *supra* note 3,) provides that, "[a]ll peoples have the right to self-determination." This is repeated in Principle 5 paragraph 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (G.A. Res. 2625, *supra* note 3). Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (G.A. Res. 61/295, *supra* note 3) provides that "[i]ndigenous peoples have the right to self-determination." In light of these statements no plausible argument can be made in the post-millennial era that "peoples" are restricted to the colonial context.

79. Articles 73(b) and 76(b) of the UN Charter (dealing with colonial and trust territories respectively) use the phrase "each territory and its peoples." This strongly indicates that more than one people can inhabit a non-self-governing territory. *See* RADAN, *supra* note 53, at 31.

80. Common Article 1(1) of the International Covenant on Economic, Social and Cultural Rights (G.A. Res. 2200, *supra* note 3) and the International Covenant on Civil and Political Rights (G.A. Res. 2200, *supra* note 3) provides that, "[a]ll peoples have the right to self-determination." This is repeated in Principle 5 paragraph 1 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (G.A. Res. 2625, *supra* note 3). Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples (G.A. Res. 61/295, *supra* note 3) similarly confirms that self-determination applies to groups within sovereign states. Moreover, the Human Rights Committee in General Comment 12 has requested states to "describe the constitutional and political processes which in practice allow the exercise of [the] right [to self-determination]." This implies that more than one people can exist within a state. Britain, for example, when reporting to the Human Rights Committee has treated the Scottish, Welsh and Irish nations as separate peoples. *See* Robert McCorquodale, *Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination*, 66 BRIT. Y.B. INT'L L. 283, 294–98 (1995); Robert McCorquodale, *The Right to Self-Determination*, *in* THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 91, 98 (David Harris & Sarah Joseph eds., 1995) [hereinafter McCorquodale, *Self-Determination*] (discussing the various peoples within the United Kingdom); RADAN, *supra* note 53, at 48.

81. Article 73(a) of the UN Charter mandates "due respect for the culture of the peoples concerned . . . ." Radan upon noting this provision has stated that "[t]he reference to culture echoes some aspects of the definition of a nation." *See* RADAN, *supra* note 53, at 31. This conclusion is supported by the Charter's *travaux préparatoires* which indicate that the term "peoples" was intended to apply to nations, particularly those that

be interpreted narrowly: "psychological perceptions and not tangible attributes"[82] should form the primary basis of peoplehood. The corollary of the foregoing points is that there are *no* reasonable grounds to argue that the definition of "peoples" in anyway precludes UNC secessionist self-determination.

A. *The UN Charter*

The legal origins of self-determination can be traced to the UN Charter, where the phrase "self-determination of peoples" was mentioned for the first time in an international legal instrument.[83]

Article 1(2) of the Charter, although providing that one of the UN's purposes is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,"[84] fails to elaborate specifically *what* this purpose entails. Article 55 also fails to offer any guidance as to the meaning of the same clause. To obtain a clearer understanding of self-determination within the Charter, it is necessary to consider Articles 73 and 76. Article 73(b) commits those states responsible for colonial territories "to develop *self-government*, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each

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were non-self-governing in eastern Europe. *See* UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, XIV DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION SAN FRANCISCO 296 (1945) [hereinafter UNCIO]. The Charter's *procès verbaux* reinforces this analysis, with the drafting committee concluding that Article 1(2) applied to states and nations: "what is intended by paragraph 2 is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights therefore extends in the Charter to states [and] nations . . . ." *Id.* at 704. Principle 5 paragraph 1 of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (G.A. Res. 2625, *supra* note 3) draws a link between "peoples" and "cultural development," thereby suggesting that peoples are cultural/national groups. *See* Glen Anderson, *Unilateral Non-Colonial Secession in International Law and Declaratory General Assembly Resolutions: Textual Content and Legal Effects*, 41 DEN. J. INT'L L. & POL'Y 345, 350 (2013) (interpreting the relationship of "peoples" to "cultural development" as suggesting the former connotes nationalist overtones).

82. Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 276 (1981).

83. JORRI DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES 12 (1996); RADAN, *supra* note 53, at 30. The phrase "self-determination" was explicitly mentioned in the Atlantic Charter, however, which pledged to "incorporate the right of peoples to self-determination into the new post-war international order." *See* Bonny Ibhawoh, *Testing the Atlantic Charter: Linking Anticolonialism, Self-Determination and Universal Human Rights*, 18 INT'L J. HUM. RTS. 842, 843–44 (2014); David B. Knight, *Territory and Peoples or People and Territory: Thoughts on Postcolonial Self-Determination*, 6 INT'L POL. SCI. REV. 248, 258 (1985).

84. U.N. Charter art. 1.

territory and its peoples and their varying stages of advancement."[85] Article 73(b) therefore suggests that self-determination is concerned with the self-government of colonial territories. Article 76(b) repeats this formulation, *mutatis mutandis*, in the context of the UN trusteeship system:

> [T]o promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards *self-government or independence* as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.[86]

Articles 73(b) and 76(b) respectively begin with the words "develop" and "promote," which indicates that their contents are *desiderata*. Hence, even if one were to reason that "self-government" included sovereign independence, no potential *right* to unilateral secession would emerge for colonial and trust territories.

This conclusion is supported by consideration of Article 1(2), which reveals that self-determination is described as a *principle*, thereby connoting the status of *lex desiderata*.[87] Accordingly, the Charter preferences the sovereignty of metropolitan and trustee powers over the self-government and independence of non-self-governing peoples. A compelling argument can therefore be made that

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85. U.N. Charter art. 73 (emphasis added).

86. U.N. Charter art. 76 (emphasis added).

87. Article 1(2) provides that one of the purposes of the UN is to "develop friendly relations among nations based on respect for the *principle* of equal rights and self-determination of peoples." (emphasis added). The word "principle" thus connotes a precatory character. *See* GNANAPALA WELHENGAMA, MINORITIES' CLAIMS: FROM AUTONOMY TO SECESSION, INTERNATIONAL LAW AND STATE PRACTICE 257 (2000) ("The principle [of self-determination] was mentioned [in the UN Charter], as among other things, *desideratum*."); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 33 (1990) ("There is probably a consensus among scholars that, whatever its political significance, the principle of self-determination did not rise to the level of a rule of international law at the time the UN Charter was drafted."); Antonio Cassese, *Political Self-Determination – Old Concepts and New Developments, in* UN LAW FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW 138 (1979); Yehuda Z. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISR. L. REV. 509, 511 (1975) ("Clearly then, self-determination, in contrast to sovereignty and all that flows from it, was not originally perceived as an operative principle of the Charter. It was regarded as a goal to be attained at some indeterminate date in the future; it was one of the *desiderata* of the Charter rather than a legal right that could be invoked as such."); Hannum, *supra* note 4, at 11; RAIĆ, *supra* note 4, at 200 n.123 (suggesting that the official English and French translations of the Charter differ as to whether self-determination is a principle or a right); Trisotto, *supra* note 6, at 426 ("After its inclusion in the U.N. Charter, self-determination quickly evolved from a principle to a right.").

the Charter does not sanction unilateral secession in a colonial or trusteeship context.[88]

The more significant question for the present Article, however, is exactly how—if at all—self-determination applies to peoples that are already self-governing or independent, namely, peoples within existing states. Articles 1(2), 55, 73(b), and 76(b) of the Charter fail to address this question. To assert that the Charter propounds that all peoples—non-self-governing and independent alike—are entitled to Western-style electoral participation is incorrect, as metropolitan powers and dictatorial states have been permitted to accede to the Charter. It is therefore unlikely that the Charter prescribes any semblance of internal self-determination for peoples within existing states, aside from perhaps the minimalist notion that such peoples have the (theoretical) right, at some temporal point, to freely determine their constitutional and political system.[89]

What can be said with certainty is that the Charter's text provides no grounds for UNC secession.[90] As mentioned above, Article 1(2)

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88. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 112 (1994) (arguing that independence is not necessarily the proper outcome in the trusteeship context); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 11 (1982) ("The Charter's emphasis, in respect of trust and non-trust territories alike, is on gradual and progressive development toward increased self-government . . . . Independence is seen only as a possible, not a necessary . . . objective."); LELAND M. GOODRICH, EDVARD HAMBRO & ANNE P. SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 30–31 (3d ed., 1969) (discussing one interpretation of the UN Charter that claims Article 2(7) applies to all provisions of the Charter); Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 INT'L & COMP. L. Q. 537, 544 (1998) (stating that in 1945 there was no immediate right to self-determination for non-self-governing peoples); RAIČ, *supra* note 4, at 200–02; CASSESE, *supra* note 4, at 42 (arguing that, "the principle enshrined in the UN Charter boils down to very little; it is only a principle suggesting that States should grant *self-government* as much as possible to the communities over which they exercise jurisdiction.").

89. *See* RAIČ, *supra* note 4, at 238.

90. *See* CASSESE, *supra* note 4, at 42 (arguing that self-determination, as expressed within the Charter "*did not mean* . . . the right of a minority or an ethnic or national group to secede from a sovereign country . . ."); WELHENGAMA, *supra* note 86, at 257 ("[T]he UN Charter did not legitimize secessionist rights."); Quane, *supra* note 88, at 546–47 ("Opinion in the literature seems to be overwhelmingly against admitting the possibility of secession."). *Contra* Przetacznik, *supra* note 14, at 101 ("It is clear from the provisions of Article 1(2) and Article 2(4) of the Charter of the United Nations that the right of secession, as an essential element of the right to self-determination of peoples and nations is recognized implicitly. If this were not so, the right to self-determination would be meaningless."); RADAN, *supra* note 53, at 33 ("The right to secession on the basis of self-determination of peoples was apparently conceded by the Chairman, Rapporteur and Secretary of the Technical Committee I/1, who, when asked by the Coordination Committee whether self-determination meant the capacity of peoples to govern themselves and whether it included a right of secession on the part of peoples within a state, replied that 'the right of self-determination meant that a people may establish any regime which they favour.'").

describes self-determination as a *principle* rather than as a right. Furthermore, consideration of Articles 73 and 76 indicates that self-determination is primarily linked with non-self-governing peoples, rather than those within existing states. Both factors militate against any potential right of peoples to UNC secession.

This conclusion is supported by the *procès verbaux*, with the drafting committee explicitly indicating that the Charter does not include a right to unilateral secession of any kind:

> Concerning the principle of self-determination, it was strongly emphasized on the one side that the principle corresponded closely to the will and desires of peoples everywhere and should be enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only in so far as it implied the right of self-government of peoples, and not the right of [UC or UNC] secession . . . .[91]

This is hardly surprising given that states—the entities that created the Charter—had a vested interest in maintaining their territorial integrity. When discussing the scope of self-determination at the San Francisco conference, for example, the Colombian delegate remarked:

> If [self-determination] means self-government, the right of a country to provide its own government, yes we would certainly like it to be included; but if it were to be interpreted, on the other hand, as connoting a withdrawal, the right of withdrawal or [UNC] secession, then we should regard that as tantamount to international anarchy, and we should not desire that it be included in the text of the Charter.[92]

Similar views were expressed by the British delegate, who stated that "[Britain does] not believe that the principle of self-determination [is] intended to form a basis upon which provinces or other parts of independent states [can] claim a right to [UNC] secession."[93] France also expressed opposition to the view that self-determination might allow for any right to UNC secession.[94] Indeed, had the Charter sanctioned UNC secession, many states would have likely declined accession to the UN.

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91. UNCIO, *supra* note 81, at 296. *See generally* WENTWORTH OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 109 (1977); Wentworth Ofuatey-Kodjoe, *Self-Determination*, *in* 1 UNITED NATIONS LEGAL ORDER 349, 353 (Oscar Schachter & Christopher C. Joyner eds., 1995) [hereinafter UNITED NATIONS LEGAL ORDER]; UMOZURIKE, *supra* note 15, at 45–46.

92. CASSESE, *supra* note 4, at 39–40; WELHENGAMA, *supra* note 87, at 258.

93. WELHENGAMA, *supra* note 87, at 258.

94. *See* UNCIO, *supra* note 81, at 142–43 (stating that the French representative questioned whether self-determination meant secession).

Before concluding, it is necessary to consider whether there are any other Charter provisions which bear upon the question of UNC secession. Article 2(4) provides that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."[95] Article 2(4) thus prohibits "the threat or use of force against the territorial integrity or political independence of any State" and would therefore seem antithetical to UC and UNC secession. However, it is generally accepted that Article 2(4) does *not* attach rights and duties to peoples—only states.[96] If it is accepted that the term "people," as employed throughout the Charter, is not necessarily synonymous with the term "state," then the content of Article 2(4), which operates exclusively in an inter-state context, *cannot* be said to have any legal bearing on matters of UC and UNC secession.[97]

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95. U.N. Charter art. 2.

96. *See* YORAM DINSTEIN, WAR AGGRESSION AND SELF-DEFENCE 87 (5th ed., 2011) ("As long as an armed conflict is strictly non-international in character . . . it simply does not come within the reach of Article 2(4)."); OLIVER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 163 (2010) ("A reading of the text of the Charter as a whole clearly suggests, then, that the prohibition of the use of force is essentially an inter-State rule, a point that is confirmed for that matter by a reading of the *travaux préparatoires*."); Glen Anderson, *Unilateral Non-Colonial Secession and the Use of Force: Effect on Claims to Statehood in International Law*, 28 CONN. J. INT'L L. 197, 214 (2013) ("Articles 2(4) and 51 [of the UN Charter] are only applicable to inter-state force, as opposed to force employed against or by peoples."); Nico Schrijver, *Secession and the Ban on the Use of Force: Some Reflections*, *in* SECESSION AND INTERNATIONAL LAW: CONFLICT AVOIDANCE – REGIONAL APPRAISALS 100 (Julie Dahlitz ed., 2003) ("[T]he application of prohibition of the threat or use of force as stipulated in Article 2, paragraph 4 is incumbent on States only and merely applicable in '*international*' relations."); Albrecht Randelzhofer, *Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 115 (Bruno Simma ed., 1994) ("[T]he prohibition of the use of force indisputably only protects and is only addressed to states."); Rosalyn Higgins, *The Attitude of Western States Towards Legal Aspects of the Use of Force*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 449 (Antonio Cassese ed., 1986) ("The Western nations also take the view – in my belief correctly – that the prohibitions on the use of force in the context of self-determination flow not from Art. 2(4) of the Charter (which deals with the use of force in an inter-state context) but from a distinct evolving international norm of self-determination."); John Dugard, *The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT'L & COMP. L. Q. 157, 172 (1967) (asserting that Article 2(4) only prohibits the use of force against states); Przetacznik, *supra* note 14, at 101 (arguing that Article 2(4) clearly only applies to external threats against a state); Libarona, *supra* note 14, at 109 ("Article 2(4) of the United Nations Charter does not affect directly individuals or peoples, but rather, the relations between States.").

97. The UN Secretariat indicated that the term "state" was used to connote "a definite political entity" whereas the term "nation" was referred to in "a broad and non-political sense." *See* UNCIO, *supra* note 81, at 657.

B. *Declaration on the Granting of Independence to Colonial Countries and Peoples*

The first declaratory General Assembly resolution to mention the *right* of peoples to self-determination was the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Colonial Declaration).[98] The Colonial Declaration was instrumental in outlawing colonialism and establishing a legal right to UC secession.[99]

Article 1 of the Colonial Declaration[100] specifies that the subjugation, domination, and exploitation of peoples, which may include situations in addition to colonialism, such as apartheid and foreign occupation, are illegal.

Article 2 continues that "all peoples have the right to self-determination,"[101] which *prima facie* indicates that self-determination includes, but is not necessarily limited to, the colonial sphere.[102]

Article 6 bears directly upon the question of UNC secession: "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."[103] Article 6, with its usage of the term "country," could be interpreted to suggest that colonial territories should not be fractured in the process of gaining independence. Alternatively, the same text could be interpreted to prohibit UNC secession. If the latter interpretation is preferred, the text generates something of a paradox: although "all peoples" enjoy the "*right* to self-determination," as enumerated in Article 2, only colonial peoples enjoy the ultimate remedy of UC secession if this right is deliberately and systematically denied. This position is hardly surprising though. Throughout the Colonial Declaration's drafting, states' representatives were careful to eschew any grounds for UNC secession. Guatemala and Sweden, for instance, concerned by the scope of Article 2, stressed the primacy of state sovereignty and territorial integrity, with the latter even seeking

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98. G.A. Res. 1514, *supra* note 3.

99. *See* SUMMERS, PEOPLES, *supra* note 4, at 203–05 (discussing the importance of the Colonial Declaration and its drafting history).

100. For preambular references to peoples see preambular paragraphs 1, 2, 3, 4, 6, 7, 8 and 11.

101. G.A. Res. 1514, *supra* note 3.

102. *See* Christian Tomuschat, *Self-Determination in a Post-Colonial World*, *in* MODERN LAW OF SELF-DETERMINATION, *supra* note 6, at 2 ("Self-determination is a right of all peoples."). *But see* Quane, *supra* note 88, at 548 (suggesting that the phrase "all peoples have the right to self-determination" should be construed narrowly to only include peoples in non-self-governing territories).

103. G.A. Res. 1514, *supra* note 3.

amendments to the draft declaration explicitly prohibiting a "segment of a population or region of a state" from pursuing UNC secession.[104]

Aside from an obvious desire to protect the integrity of the state-centric international system, there were two other important reasons for the Colonial Declaration's prohibition on UNC secession: first, the desire to prevent warfare between rival indigenous peoples, particularly in Africa with its strong tribal affiliations; and second, the concern that such warfare would impede the decolonization process.[105] Proponents of the Colonial Declaration thus recognized that if it were to allow UNC secession, the resulting inter-ethnic violence, particularly in Africa, would almost certainly be seized upon by colonial powers as justification for renewed occupation. The pragmatism of indigenous colonial elites, understandably desirous of wresting power from foreign occupiers, thus coincided with the international community's desire to uphold the principles of state sovereignty and territorial integrity.

Before concluding, a final point requires mention, namely, that the Colonial Declaration cannot be invoked as justification for UNC secession from situations of so-called internal colonialism, that is, colonialism of a domestic nature consisting of economic, social, and administrative differences within an apparently unitary, cohesive, and sovereign state.[106] This is because Article 6 rules out any alterations

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104. *See* U.N. GAOR, 15th Sess., 947th plen. mtg. at 1271, U.N. Doc. A/15/PV.947 (Dec. 14, 1960) (citing the Guatemalan representative as saying Guatemala would prefer the concept of territorial integrity be more clearly expressed); U.N. GAOR, 15th Sess., 946th plen. mtg. at 1266, U.N. Doc. A/15/PV.946 (Dec. 14, 1960) (citing the Swedish representative as saying that Sweden is concerned that the application of the last preambular paragraph of the draft resolution encroaches on the idea of sovereignty); *see also* WELHENGAMA, *supra* note 87, at 261.

105. *See* James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 IOWA L. REV. 837, 840 (1990) (describing the normative trend favoring pragmatic stability over historical sovereignty-based ethnic autonomy claims); RADAN, *supra* note 53, at 67; Nanda, *supra* note 82, at 275 (describing the fear of tribal fragmentation of newly emancipated states).

106. Such situations have existed with indigenous communities, for example, which often suffer grinding poverty rates, lack appropriate health care, and are denied—formally and informally—access to employment opportunities. *See* MICHAEL HECHTER, INTERNAL COLONIALISM: THE CELTIC FRINGE IN BRITISH NATIONAL DEVELOPMENT 1536-1966 30–34 (1975) (discussing exogenous and endogenous colonialism); Barry Sautman, *Is Tibet China's Colony: The Claim of Demographic Catastrophe*, 15 COLUM. J. ASIAN L. 82, 83 (2001); Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT'L & COMP. L. 9, 10–54 (1999) (arguing that decolonization should be extended to territories that have not realized self-determination and are contiguous to the state exercising control over them); P. Akhavan, *Lessons From Iraqi Kurdistan: Self-Determination and Humanitarian Intervention Against Genocide*, 11 NETH. Q. HUM. RTS. 41, 59 (1993) (explaining that self-determination is most often cited in instances of overseas European colonization and not in instances of geographically co-located ethnic or cultural groups); Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 298–

to "the national unity and territorial integrity of a country."[107] As intimated above, the term "country" may encompass existing states. Without the inclusion of Article 6, disadvantaged and impoverished peoples *within* existing states might have been able to press for UNC secession, arguing that their situation constituted one of "subjugation, domination, and exploitation" pursuant to Article 1.

In any event, Resolution 1541,[108] which accompanied the Colonial Declaration, contained a number of provisions which ruled out any possibility for UNC secession under the premise of internal colonialism. Principle 4 of Resolution 1541 provided that "[p]rima facie there is an obligation to transmit information in respect of a territory which is *geographically separate* and is distinct ethnically and/or culturally from the country administering it."[109] The same point is explicitly and implicitly reinforced in Principles 5 and 6 of the same resolution. Independence was only permitted for territories "geographically separate and . . . distinct ethnically and/or culturally" from the metropolitan power.[110]

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301 (1992) (arguing that secession should be extended to instances of internal colonialism); M. Sornarajah, *Internal Colonialism and Humanitarian Intervention*, 11 GA. J. INT'L & COMP. L. 45, 45–47 (1981) ("International lawyers generally agree that if a right of self-determination exists in international law, it is exhausted once the process of decolonization ends.").

107. G.A. Res. 1514, *supra* note 3.

108. Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for in Article 73e of the Charter of the United Nations (XV), 15 December 1960 ¶¶ 4–6.

109. *Id.* ¶ 4 (emphasis added).

110. *But see* Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 13–14 (Catherine Brölmann, René Lefeber & Marjoleine Zieck eds., 1993) ("[In the case of] a minority within a sovereign state – especially if it occupies a discrete territory within that state – [which is] persistently and egregiously denied political and social equality and the opportunity to retain its cultural identity . . . it is conceivable that international law will define such repression, prohibited by the Political Covenant, as coming within a somewhat stretched definition of colonialism. Such repression, even by an independent state not normally thought to be 'imperial' would then give rise to a right of 'decolonization.'"). *See also contra*, James Crawford, *Outside the Colonial Context*, *in* SELF-DETERMINATION IN THE COMMONWEALTH 13–14 (W. J. Allan Macartney ed., 1988) ("So far as distinct groups inhabiting a specified territory within a State are concerned, one possibility is that these may be treated in such a way by the central government that they may become in effect non-self-governing territories with respect to the rest of the State. This was arguably the case with East Bengal. According to General Assembly Resolution 1541 (XV), Principle IV, a territory is prima facie non-self-governing if it is geographically separate and ethnically distinct from the 'county administering it'. Geographical separateness has usually been taken to require separation across land or sea (as was indeed the case with East Bengal), but there is no good reason why other defining characteristics, including historical boundaries or *de facto* boundaries established through hostile action of the government in question might not also be relevant. But geographic and ethnic distinctiveness is of itself not enough: it is also necessary that the relationship between the State as a whole and the territory be one which arbitrarily places the latter in a position

C. *International Human Rights Covenants*

In December 1966, the UN General Assembly unanimously adopted the International Covenant on Economic, Social and Cultural Rights[111] (Economic Rights Covenant) and the International Covenant on Civil and Political Rights[112] (Civil Rights Covenant). These two documents expanded on the earlier work of the more limited 1948 Universal Declaration of Human Rights,[113] striving to entrench civil, political, economic, social, and cultural rights as peremptory norms of international law.[114]

Common Article 1(1) of both Covenants makes it clear that self-determination is a *right* applicable to "*[a]ll* peoples."[115] The description of self-determination as a right, and not as a principle, as stated in the UN Charter, strongly implies that there are remedies—potentially including UNC secession—in the event of breach.[116] This is further supported by the second sentence of common Article 1(1), which suggests that "by virtue of that right [all peoples may] freely determine their political status and freely pursue their economic, social and cultural development."[117]

Common Article 1(2) provides that all peoples may "for their own ends, freely dispose of their natural wealth and resources"[118] and thus seems to supplement the duty outlined in the second sentence of common Article 1(1), enumerating criteria that, if breached, may give rise to a potential remedy.

Common Article 1(3) enunciates that peoples in non-self-governing and trust territories are entitled to "the *right* of self-determination"[119] and that metropolitan powers "shall promote the realization of [this right] . . . in conformity with the provisions of the

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or status of subordination. Measures discriminating against a people of a region on grounds of their ethnic origin or cultural distinctiveness may thus define the territory concerned as non-self-governing according to these criteria. [However] situations of internal colonialism (such as East Bengal) are very much the exception.").

111. G.A. Res. 2200, *supra* note 3.

112. *Id.*

113. Adopted by the General Assembly, Dec. 10, 1948. For commentary on this instrument, see Juan Carillo Salcedo, *Human Rights, Universal Declaration (1948), in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW Vol. 2, 922–26 (Rudolf Bernhardt ed., 1995).

114. *See* Vienna Convention, *supra* note 70 (stating that peremptory, norms are those "accepted and recognized" by "the international community of States as a whole . . . from which no derogation is permitted").

115. G.A. Res. 2200, *supra* note 3.

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

117. G.A. Res. 2200, *supra* note 3.

118. *Id.*

119. *Id.* (emphasis added).

Charter . . . ."[120] As previously established, the UN Charter in Articles 73 and 76 indicates that self-determination applies to peoples in non-self-governing and trust territories. Importantly though, the Charter in Article 1(2) only characterizes self-determination as a *principle* and not a right. Nonetheless, if it is conceded that common Articles 1(1) and 1(3) of the Covenants transform self-determination from a principle into a right (as the text explicitly indicates), it follows that common Article 1(3) allows a right of UC secession, even if this is inconsistent with the Charter. This conclusion is broadly supported by the drafting committee for the Covenants.[121]

As to UNC secession, the Covenants remain silent. What can be said with certainty, however, is that the debate within the drafting committee made clear that self-determination—as described in common Article 1—was defined as the right to self-government, or internal self-determination, and that sub-state national groups were provided with no support for UNC secession.[122]

Before concluding, it is necessary to consider Article 27 of the Civil Rights Covenant, which describes a minority's enjoyment of their own culture, practice of their own religion, and use of their own language as rights, thereby implying remedies are available should those rights be denied. As Thomas Franck,[123] Derege Demissie,[124] and Lee Buchheit[125] have suggested though, it is incorrect to interpret Article 27—despite its strong protection for minorities—as providing any grounds, explicit or implicit, for UC or UNC secession. This is because Article 27 applies only to *individuals* and not to collectives, as demonstrated by the use of the word "persons" (individuals) rather

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120 *Id.*

121. *See* LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 83–84 (1978); MOSES MOSKOWITZ, THE POLITICS AND DYNAMICS OF HUMAN RIGHTS 160–61 (1968); Gerry Simpson, *The Diffusion of Sovereignty in the Post Colonial Age*, 32 STAN. J. INT'L L. 255, 269 (1996); Quane, *supra* note 88 at 561–62; UNITED NATIONS LEGAL ORDER, *supra* note 91, at 356–57 (after considering the drafting committee, stating that "subjugated peoples" have the "right to self-government").

122. In this sense, the Covenants mirrored the UN Charter. *See* Sally Morphet, *Article 1 of the Human Rights Covenants: Its Development and Current Significance*, *in*, HUMAN RIGHTS AND FOREIGN POLICY 67, 77–78 (Dilys M. Hill ed., 1989); DUURSMA, *supra* note 83 at 33–34; Quane, *supra* note 88 at 58–59; UNITED NATIONS LEGAL ORDER, *supra* note 91, at 357.

123. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 58 (1992) [hereinafter Franck, *Governance*] ("[N]ot included among the enumerated rights of these minorities as defined in Article 27 is any entitlement to secede."); Franck, *supra* note 110, at 11.

124. Derege Demissie, *Self-Determination including Secession vs. the Territorial Integrity of Nation States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 168–69 (1996–1997).

125. BUCHHEIT, *supra* note 121, at 84–85.

than "peoples" or "groups" (collectives).[126] Disputes brought before the Human Rights Committee under the Optional Protocol,[127] such as *Chief Ominayak and the Lubicon Lake Band v. Canada*,[128] *Kitok v. Sweden*,[129] *Lansmann v. Finland*,[130] *Apirana Mahuika v. New Zealand*,[131] and *Diergaardt v. Namibia*,[132] confirm this interpretation.

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126. Confusion often arises because before an individual can seek redress under Article 27, they must be a constituent part of a collective, such as a national minority or people. *See, e.g.*, REIN MÜLLERSON, INTERNATIONAL LAW, RIGHTS AND POLITICS: DEVELOPMENTS IN EASTERN EUROPE AND THE CIS 73–74 (1994); Gaetano Pentassuglia, *State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View*, 9 INT'L J. ON MINORITY & GROUP RTS. 303, 308 (2002); Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 376 (1991) ("The first general formulation relevant to minorities was Article 27 of the Covenant on Civil and Political Rights, though the article was deliberately worded in terms of individual rights because of the resistance of states to any provision granting rights to minorities."); Louis B. Sohn, *Rights Under International Law of Persons Belonging to National Religious and Linguistic Minorities*, *in* MINORITIES IN THE SOVIET UNION UNDER INTERNATIONAL LAW 14 (George Brunner & Allen Kagedan eds., 1988); Francesco Capotorti, *The Protection of Minorities Under Multilateral Agreements on Human Rights*, 1 ITALIAN Y.B. INT'L L. 3, 19 (1976) ("[I]t must be borne in mind that Article 27 refers to the rights of individuals being exercised 'in community with the other members of their group.'"); CASSESE, *supra* note 4 at 61 ("[Article 27] addresses itself to individual, as opposed to group rights. It is the individual members of a minority group, not the group itself, who are the holders of the rights conferred."); RADAN, *supra* note 53, at 44 ("Article 27 does not confer rights on a minority as a collective, but rather on 'persons belonging to such minorities'. An individual member of a minority has rights 'in community with other members'. The 'community' requirement necessitates the existence of a minority as a collective group before an individual member of a minority can assert the rights conferred by Article 27."); McCorquodale, *Self-Determination*, *supra* note 80, at 92; WELHENGAMA, *supra* note 87, at 269–70 ("The wording of article 27 unequivocally suggests that it is only individuals belonging to minority groups who can claim benefit under it."). It should be noted that the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (G.A. Res. 47/135, Dec. 18, 1992), is similar to Article 27 in that it ascribes rights to individuals belonging to groups, not groups *per se*. It does not, therefore, have any bearing on the rights of groups to UNC secession. *See generally* WELHENGAMA, *supra* note 87, at 272–73.

127. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 3. Adopted and opened for signature, ratification and accession by G.A. Res. 2200 (XXI), entry into force March 23, 1976, in accordance with Article 9.

128. *See, e.g.*, Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication no. 167/1984, ¶ 32, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990).

129. *See, e.g.*, Human Rights Committee, View of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication no. 197/1985, ¶ 6.3, U.N. Doc. CCPR/C/33/D/197 (Aug. 10, 1988).

130. *See, e.g.*, Human Rights Committee, Länsman et al. v. Finland, Communication no. 511/1992, ¶ 9.4, U.N. Doc. CCPR/C/52/D/511 (Nov. 8, 1994).

131. *See, e.g.*, Human Rights Committee, Apirana Mahuika et al. v. New Zealand, Communication no. 547/1993, ¶ 9.4 U.N. Doc. CCPR/C/70/D/547/1993 (Oct. 27, 2000).

132. *See, e.g.*, Human Rights Committee, Diergaardt et al. v. Namibia, Communication no. 760/1997, ¶ 10.3, U.N. Doc. CCPR/C/63/D/760/1997 (July 7, 1998).

So too does the General Comment on Article 27 by the Human Rights Committee:

> In some communications submitted to the Committee under the Optional Protocol, the right protected under Article 27 has been confused with the right of peoples to self-determination proclaimed in Article 1 of the Covenant . . . . The Covenant draws a distinction between the right to self-determination and the rights protected under Article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (part 1) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on *individuals* as such and is included, like the articles relating to other *personal rights* conferred on *individuals*, in part III of the Covenant and is cognizable under the Optional Protocol.[133]

The same General Comment also noted that "the enjoyment of the right to which Article 27 relates does not prejudice the sovereignty and territorial integrity of a State party."[134] Both Covenants therefore fail to provide grounds for UNC secession.

D. *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[135] (Friendly Relations Declaration) was passed by the UN General Assembly in October 1970.[136] Principle 5 deals with the "equal rights and self-determination of peoples" and is widely credited with providing the first legal justification for UNC secessionist self-determination.

Principle 5 paragraph 1 articulates that self-determination is a right and applies to "all peoples."[137] Paragraph 2 affirms that self-determination is capable of remedying situations of colonialism and

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133. Human Rights Committee, General Comment No. 23: Article 27 (Rights of Minorities), ¶¶ 2, 3.1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994) (emphasis added).

134. *Id.* ¶ 3.2.

135. G.A. Res. 2625, *supra* note 3, at 121.

136. The Friendly Relations Declaration articulates various principles: (1) the prohibition of 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. *See* Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 713 (1971). For a detailed analysis of these principles, see V. S. MANI, BASIC PRINCIPLES OF MODERN INTERNATIONAL LAW (1993).

137. G.A. Res. 2625, *supra* note 3.

"alien subjugation, domination and exploitation,"[138] the latter including, but not being restricted to, the colonial context.[139] Paragraph 4 stipulates that a people can pursue external self-determination by 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."[140] This stipulation is not restricted to the colonial context, thereby inferentially opening the possibility that the establishment of a "sovereign and independent State" includes UNC secession.[141] Paragraph 5 enumerates the duty of states "to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence."[142] As paragraph 5 does not limit its application to colonial peoples, it also inferentially opens up the prospect that the exercise of "freedom and independence" in response to the deprivation of the right of self-determination could include UNC secession.[143]

The best grounds for UNC secession are contained in Principle 5 paragraph 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, *and thus possessed of a government representing the whole people belonging to the territory, without distinction as to race, creed or colour.*[144]

Paragraph 7 thus stipulates that if a government does not represent the whole population, or discriminates on the grounds of

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138. G.A. Res. 2625, *supra* note 3.

139. See concurring analysis in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 (Can.), ¶ 133 (per Lamer CJ, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, & Binnie JJ.).

140. G.A. Res. 2625, *supra* note 3.

141. Anderson, *supra* note 81, at 354.

142. G.A. Res. 2625, *supra* note 3.

143. Anderson, *supra* note 81, at 354–55. Analysis of Principle 5 paragraph 5 is often overlooked by scholars, who prefer only to examine paragraph 7. *See* CASTELLINO, *supra* note 6, at 39–40, however, who asserts that paragraph 5: "appears to endorse self-determination over territorial integrity since it states that a people struggling to emancipate themselves should be allowed to pursue this course of action." Castellino later concludes that paragraph 7 negates this possibility. Arangio-Ruiz holds that paragraph 5: "envisages a 'right of resistance.'" He stops short of equating it with a right to UNC secession. *See* Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 RECUEIL DES COURS 419, 568 (1972).

144. G.A. Res. 2625, *supra* note 3.

"race, creed or colour,"[145] it is illegitimate and in violation of the right of self-determination. In order to remedy this situation, activities which would "dismember or impair, totally or in part the territorial integrity or political unity of sovereign and independent states"—including UNC secession—appear to be impliedly permitted.[146]

Paragraph 7 thus mandates that peoples should enjoy freedom from discrimination on the grounds of "race, creed or colour." This necessitates the following question: What do these terms mean? Antonio Cassese has proffered the most cited analysis, concluding that the terms "race" and "colour" connote physical, somatic distinctions.[147] This, however, is unduly narrow.[148] Article 1 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, for example, provides that "racial discrimination" means "any distinction, exclusion or restriction or preference based on race, colour, descent, or national or ethnic origin." This suggests that other factors associated with national identity and ethnicity, such as language, culture, and customs, are also likely included.[149]

More compellingly, Cassese determines that "creed" refers to religious beliefs.[150] This is because if "creed" were interpreted more broadly, in line with the *Oxford English Dictionary*, so as to include any "set of opinions on any subject,"[151] then a government not representing the opinions of a people, even if democratically elected, could be interpreted as violating self-determination. Such an expansive definition of "creed" seems unlikely.[152]

To summarize then, 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,

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145. Such behavior would likely offend Articles 2, 14, 17, 18, 24, 25, 26 and 27 of the Civil Rights Covenant, and Articles 2, 7(a)(i), possibly 13(1) and 15(1)(a) of the Economic Rights Covenant.

146. *See* P. H. Kooijmans, *Tolerance, Sovereignty and Self-Determination*, 43 NETHERLANDS INT'L L. REV. 211, 212–13 (1996); M. Rafiqul Islam, *Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville in International Law*, 13 U. HAW. L. REV. 453, 456–60 (1991); Jordan J. Paust, *Self-Determination: A Definitional Focus*, *in* SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 7 (Yonah Alexander & Robert A. Friedlander eds., 1980); RADAN, *supra* note 53, at 52–53; Anderson, *supra* note 81, at 355; UNITED NATIONS LEGAL ORDER, *supra* note 91, at 362–63; BUCHHEIT, *supra* note 121, at 92–93; Rosenstock, *supra* note 136, at 732.

147. *See* CASSESE, *supra* note 4, at 112.

148. Anderson, *supra* note 81, at 356–58.

149. *Id.* at 357.

150. CASSESE, *supra* note 4 at 112–14.

151. SHORTER OXFORD ENGLISH DICTIONARY, Vol. 1, 453 (1973).

152. Anderson, *supra* note 81, at 358.

creed or colour."[153] The words "race," "creed," and "colour" comprehend racial, linguistic, cultural, customary, and religious discrimination.[154] Correlatively, peoples subjected to racial, linguistic, cultural, customary, or religious discrimination have a *prima facie* right to pursue UNC secession.

There are also implied requirements, however, which have to be satisfied before a right to UNC secession will arise. First, the discrimination must be of a deliberate, sustained, and systematic nature, with "the exclusion of any likelihood for a possible peaceful solution within the existing state structure."[155] This means that a government must knowingly and intentionally inflict discrimination against a people. Mere *de minimis* or unknowing instances of discrimination will not do. Something more is required, namely, governmental behavior which evidences *dolus*, or intentional malice, towards a people. Additionally, there must be a fundamental loss of rapport between the parties to the dispute, precluding the likelihood of a harmonious resolution. These requirements function as a threshold test for the operation of paragraph 7 rights, ensuring that UNC secession is only available under especially egregious conditions.

A second implied requirement for the exercise of paragraph 7 rights is that the systematic, deliberate, and sustained discrimination must possess sufficient contemporaneousness. In other words, there must be a sufficient temporal nexus between the alleged discrimination and the resulting claim for UNC secession.[156] Without the requirement of such a nexus, peoples would be potentially free to pursue UNC secession on the basis of human rights abuses that might

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153. G.A. Res. 2625, *supra* note 3.

154. This is a finding explicitly ruled out by Cassese, who argues: "the right of internal self-determination embodied in the 1970 [Friendly Relations] 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 4, at 114.

155. *Id.* at 119–20; For similar comments, see Dietrich Murswiek, *The Issue of Right of Secession – Reconsidered, in* MODERN LAW OF SELF-DETERMINATION, *supra* note 6, at 26 ("[T]here cannot be a right of secession in every case of discrimination, especially if there are still chances that the State authorities may stop the discrimination when requested or even if legal remedies are given."); Doehring, *supra* note 4, at 66 ("The right of secession may be excessive if the expectation still exists that the state authorities are prepared to stop the discrimination or if legal remedies and protection by tribunals are available."); Nanda, *supra* note 82, at 276 ("For a claim [of secession] to be considered valid, the reasons ought to be compelling. There must be little hope that any action short of separation would satisfy the subgroup's desire for effective participation in the value process."); Kooijmans, *supra* note 146, at 216 ("[T]he right of secession is not a normal emanation of the right to self-determination, but an *ultimum remedium*, to be resorted to only if all efforts to find a solution within the State structure have been to no avail and if local and international remedies have turned out to be fruitless.").

156. Anderson, *supra* note 81, at 359.

have occurred hundreds of years previously. A hypothetical example demonstrates the potential problem: Could the descendants of the Brythonic Kingdom of Dumnonia claim to secede from the United Kingdom on the basis of their incorporation into the Kingdom of Wessex in the Middle Ages?[157] The precise time period necessary for the expiration of a right to UNC secession is contestable, although it is suggested here that a minimum of ten to fifteen years from the cessation of abuses would be required. This would mean that a relatively shorter time period, such as five years, should not jeopardize a valid claim.[158]

A third implied requirement in paragraph 7 is that the group seeking UNC secession must agree to protect and uphold the human rights of any potential minorities, preferably by way of constitutional guarantees.[159] This requirement, which might be conveniently termed the "internal consistency principle," guarantees that minorities—especially those who were previously part of an oppressive majority—are not subjected to a new discriminatory state.[160] The internal consistency principle thus ensures that self-determination, if it is to be utilized in furtherance of UNC secession, must be exercised commensurately with the broader ethos of the law of self-determination.[161]

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157. *See* ALBANY MAJOR, EARLY WARS OF WESSEX 92–98 (Charles W. Whistler ed., 1913) (explaining the incorporation of the Brythonic Kingdom of Dumnonia).

158. Anderson, *supra* note 81, at 359.

159. The principle appears to be articulated by G.A. Res. 54/183 which proscribes the "ethnically based divisions" and "cantonization" of Kosovo. *See* G.A. Res. 54/183, ¶ 7, U.N. Doc. A/Res/54/183 (Feb. 29, 2000). The same requirement was also emphasized by the European Community in 1991, with its adoption of "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union" which emphasized respect for the UN Charter, the rule of law, democracy and human rights. Specifically, the latter required guarantees for the human rights of ethnic and national groups and minorities. *See* Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, Dec. 16, 1991, 31 I.L.M. 1486, 1486–87. Tierney, after examining the EC Guidelines, claims that: "the application of human rights criteria in the recognition process [of the former Yugoslav republics] is a new development, and arguably one which impacts upon the meaning of the [Friendly Relations Declaration], and upon the limited exception to the guarantee of territorial integrity which it contains [i.e., Principle 5 paragraph 7] . . . ." *See* Stephen Tierney, *In a State of Flux: Self-Determination and the Collapse of Yugoslavia*, 6 INT'L J. ON MINORITY & GROUP RTS. 197, 214 (1999). See also general discussion *viz* the protection of newly created minorities, Robert W. McGee, *Secession Reconsidered*, 11 J. LIBERTARIAN STUD. 11, 27 (1994).

160. Anderson, *supra* note 81, at 359–60.

161. Scholars who have mooted these requirements include Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 161 (1994); Holly A. Osterland, *National Self-Determination and Secession: The Slovak Model*, 25 CASE W. RES. J. INT'L L. 655, 677 (1993); Lawrence M. Frankel, *International Law of Secession: New Rules For a New Era*, 14 HOUS. J. INT'L L. 521, 551–52 (1992). The obvious need for such guarantees has been highlighted by Horowitz, who correctly points out that: "most

A fourth implied requirement in paragraph 7 is that the group seeking UNC secession must adhere to the rules for statehood in international law. Two requirements are necessary. First, the indicia enumerated in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States—that a state must possess a permanent population, a defined territorial claim, a government, and a capacity to enter relations with other states—must be satisfied.[162] Second, the state must fulfill the criteria for statehood based on compliance with peremptory norms, in particular, the prohibition on the illegal use of force.[163] Failure to satisfy one or more of these conditions, with the possible exception of effective government,[164] would be fatal to any UNC secession attempt, preventing the legal realization of statehood and precluding other states from granting vitally important recognition.[165]

Finally, paragraph 8 of Principle 5 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

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secessionist regions are ethnically or subethnically heterogeneous." DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 267 (1985).

162. JOHN DUGARD, RECOGNITION AND THE UNITED NATIONS 7 (1987); CRAWFORD, *supra* note 14, at 45–46; RADAN, *supra* note 53, at 21; CRAWFORD, *supra* note 70, at 128–30; *see also* Thomas Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 413–14 (1999).

163. Anderson, *supra* note 96, *passim*; On the criteria for statehood based on compliance with peremptory norms generally, see RAIČ, *supra* note 4, at 156, 167; Vidmar, *supra* note 4, at 821–25; CRAWFORD, *supra* note 14, at 107; DUURSMA, *supra* note 83, at 127–28.

164. Glen Anderson, *Unilateral Non-Colonial Secession and the Criteria for Statehood in International Law*, 41 BROOK. J. INT'L L. 1, 30–41 (2015) (using the examples of Bangladesh, Croatia, and Kosovo to illustrate that failure to satisfy the effective government criterion may be overcome by the right of self-determination in cases of human rights abuses *in extremis*); RAIČ, *supra* note 4, at 364.

165. RADAN, *supra* note 53, at 245; Osterland, *supra* note 161, at 676–78; Anderson, *supra* note 164, at 91–97; *See also* Ved P. Nanda, *The New Dynamics of Self-Determination: Revisiting Self-Determination as an International Law Concept*, 3 ILSA J. INT'L & COMP. L. 443, 446 (1997); Frankel, *supra* note 161, at 550. Lloyd argues the traditional criteria for statehood played an important role in the recognition of the former Soviet and Yugoslav republics. *See* 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). It must be noted, however, that there are no "binding rules" of international law for recognition of a new state. The Montevideo Convention merely serves as a generally accepted guide. *See* Igor Grazin, *The International Recognition of National Rights: The Baltic States' Case*, 66 NOTRE DAME L. REV. 1385, 1388 (1991). Galloway, for instance, has suggested a slightly different and equally commendable formula for recognition of statehood: *de facto* control of territory and government, public acquiescence in the authority of the government, and a willingness to comply with international obligations. *See* THOMAS L. GALLOWAY, RECOGNIZING FOREIGN GOVERNMENTS: THE PRACTICE OF THE UNITED STATES 5–6 (1978). The ability to secure recognition is critically important, as once sovereignty is established, the government concerned is legally entitled to seek and receive third party military intervention, which may be necessary for the state's survival.

country."[166] The opening words of the paragraph, "every state," clearly indicate that the content of the paragraph applies only to *states*—not peoples.[167] This is hardly surprising, given that the entire declaration is directed at friendly relations and cooperation *among states*.[168] Thus, paragraph 8 does not in any way prejudice the operation of paragraph 7 rights, which are exercisable by peoples.[169]

The Friendly Relations Declaration therefore allows self-determination to predominate over state sovereignty and territorial integrity in the event of deliberate, sustained, and systematic human rights violations against peoples. By doing so, the Declaration draws a link between internal and external self-determination: the neglect of the former provides justification for the invoking of the latter, which may be exercised by UNC secession.[170] This is a seminal development, challenging—albeit modestly—the long-entrenched incontrovertibility of state sovereignty and territorial integrity.

In addition to Cassese,[171] various other scholars have broadly concurred with the foregoing analysis.[172]

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166. G.A. Res. 2625, *supra* note 3.

167. *Id.*

168. The Friendly Relations 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.* at pmbl. (emphasis added).

169. Robin C.A. White, *Self-Determination: Time for a Reassessment?*, 28 NETH. INT'L L. REV. 147, 159 (1981) (emphasizing that paragraph 8 is directed towards states—not peoples); MUSGRAVE, *supra* note 14, at 76 ("The injunction in paragraph 8 . . . applied only to states, and not to peoples excluded from government."); RADAN, *supra* note 53 at 56 (noting that paragraph 8 relates to states and that "there is no prohibition in paragraph 8 against a people seeking self-determination either by secession or by replacement of an unrepresentative government").

170. CASSESE, *supra* note 4, at 120; *see also* Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 340, 305–06 (1994).

171. Cassese states:

> Although secession is implicitly authorized by the [Friendly Relations] 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, 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.

CASSESE, *surpa* note 4, at 119–20.

172. *See* MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: "SELFISTANS," SECESSION, AND THE RULE OF THE GREAT POWERS 20 (2013); KRISTIN HENRARD, DEVISING AN ADEQUATE SYSTEM OF MINORITY

PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS AND THE RIGHT TO SELF-DETERMINATION 289 (2000) ("It is widely postulated that [Principle 5 paragraph 7 of the Friendly Relations Declaration] would imply that the principle of territorial integrity and the restriction it implies for the implementation of the right to self-determination is only applied to these states the governments of which represent the entire people living in the territory, in conformity with the principle of internal self-determination. There would, however, be a right to secession if this requirement would not be fulfilled . . . ."); B. C. NIRMAL, THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW 253 (1999) (after discussing the Friendly Relations Declaration noting that "where the denial of the right to balanced development, the right to physical existence and the right to preservation of separate identity is blatant and the political strategy of non-violence for the redressal of these grievances has failed, and secession appears to be the only remedy, claim to secede is not illegitimate"); J. N. SAXENA, SELF-DETERMINATION: FROM BIAFRA TO BANGLA DESH 15 (1978) ("[A] doubt is certainly created that if the conditions laid down in the [Friendly Relations] Declaration are not fulfilled, a right to secession may arise."); Andrew Coffin, *Self-Determination and Terrorism: Creating a New Paradigm of Differentiation*, 63 NAVAL L. REV. 31, 37 (2014) ("[Principle 5 paragraph 7 of the Friendly Relations Declaration] seems to imply that where a government does not represent without distinction as to race, creed, or color, the offended minority may impair the territorial integrity or political unity of the sovereign."); Tamara Jaber, *A Case for Kosovo? Self-Determination and Secession in the 21st Century*, 15 INT'L J. HUM. RTS. 926, 936 (2011) ("[Principle 5 paragraph 7 of the Friendly Relations Declaration] suggests that respect for [the] territorial integrity of states is contingent upon compliance with the right of self-determination. It has consequently been said to implicitly introduce a right of remedial secession in situations where states have persistently failed to safeguard the right of its population to self-determination."); Jorge Martínez Paolett, *Rights and Duties of Minorities in a Context of Post-Colonial Self-Determination: Basques and Catalans in Contemporary Spain*, 15 BUFF. HUM. RTS. L. REV. 159, 166–67 (2009) ("[Principle 5 paragraph 7 of the Friendly Relations Declaration] makes the territorial integrity of the state contingent upon the existence of a government representing the whole people; one that is respectful of human rights and the principle of non-discrimination. In the absence of such governments, secession is permitted for the excluded and oppressed population."); Michel Seymour, *Secession as a Remedial Right*, 50 INQUIRY 395, 400 (2007) ("The [Friendly Relations] Declaration . . . treats nations as unique among all cultural groups, acknowledges that they have a primary right to internal self-determination, and recognizes that they could be entitled to secede if this right were violated."); Timothy William Waters, *Contemplating Failure and Creating Alternatives in the Balkans: Bosnia's Peoples, Democracy, and the Shape of Self-Determination*, 29 YALE J. INT'L L. 423, 435 (2004) (after some non-committal discussion stating that Principle 5 paragraph 7 of the Friendly Relations Declaration "arguably allows the exercise of self-determination by a sub-population when the state fails to provide equal rights of political participation to ethnic and religious minorities"); Diane F. Orentlicher, *International Responses to Separatist Claims: Are Democratic Principles Relevant?*, *in* SECESSION AND SELF-DETERMINATION 19, 22 (Stephen Macedo & Allen Buchanan, eds., 2003) ("Outside the special context of decolonization, established states would enjoy the right to territorial integrity. But the [Friendly Relations Declaration] famously hinted that this right might be forfeited if a state's government did not represent 'the whole people belonging to the territory without distinction as to race creed or colour.'"); Pius L. Okoronkwo, *Self-Determination and the Legality of Biafra's Secession Under International Law*, 25 LOY. L.A. INT'L & COMP. L. REV. 63, 93–94, 107–08, 115 (2002) (explaining that the Friendly Relations Declaration only allows peoples to invoke their right to self-determination through secession if their government "does not represent their interests and discriminates against them"); James Crawford, *Right of Self-Determination in International Law*, *in* PEOPLES' RIGHTS 57 (Philip Alston, ed., 2001); Lorie M. Graham, *Self-Determination for*

Indigenous Peoples after Kosovo: Translating Self-Determination "into Practice" and "into Peace", 6 ILSA J. INT'L & COMP. L. 455, 464 (2000) ("[Under] the [Friendly Relations] Declaration . . . where serious human rights violations persist and no other remedy is available secession may be the only proper course of action."); Helen Quane, *A Right to Self-Determination for the Kosovo Albanians?* 13 LEIDEN J. INT'L L. 219, 223 (2000) ("Paragraph [7] affirms respect for the territorial integrity of states complying with the right to self-determination and 'thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' It suggests that the territorial integrity of a state will be protected if it has a representative system of government. In the absence of such government, it opens up the possibility of secession."); C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 588 (1999) ("[E]ven if one were to consider the [Friendly Relations] Declaration indicative of a prescriptive law there still remains no absolute right to secession. Indeed, one could argue that existing international law could permit some form of secession under very restricted conditions [such as] . . . a minority . . . under a racist or other form of discriminatory regime . . . ."); Roya M. Hanna, *Right to Self-Determination in Re Secession of Quebec*, 23 MD J. INT'L L. & TRADE 213, 228 (1999) ("[Principle 5 paragraph 7 of the Friendly Relations Declaration] has been interpreted to authorize secession of peoples from states that do not conduct themselves in compliance with the principle of self-determination. Furthermore, the Declaration imposes a requirement that governments be representative of the people they govern. If the government is not representative, this Declaration suggests that secession may be a legitimate exercise of the right of self-determination."); Valerie Epps, *Self-Determination in the Taiwan/China Context*, 32 NEW ENG. L. REV. 685, 688 (1998) ("[T]hese . . . Declarations . . . say that people have a right of self-determination but they do not have a right to secession unless the government does not represent the whole of the people."); Yoram Dinstein, *Is There a Right to Secede?*, 90 AM. SOC'Y INT'L L. PROC. 299, 301 (1996) ("[Principle 5, paragraph 7 of the Friendly Relations Declaration] protects multinational states from possible disintegration, as long as they are characterized by representative government of all segments of the population (including, in particular, ethnic minorities). Thus, self-determination is allowed only when representative institutions are lacking and, presumably, when it would lead to their establishment."); Stephan A. Wangsgard, *Secession, Humanitarian Intervention, and Clear Objectives: When to Commit United States Military Forces*, 3 TULSA J. INT'L & COMP. L. 313, 316 (1996) ("The importance of the [Friendly Relations] Declaration is that it has created a limited right to secede."); Neil Finkelstein, George Vegh, & Camille Joy, *Does Quebec have a Right to Secede at International Law?*, 74 CAN. BAR REV. 225, 241–42, 252–53, 260 (1995); Mitchell Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 128 (1995) ("[P]aragraph [7] [of the Friendly Relations Declaration] appears to recognize that secession may be a legitimate option under certain circumstances."); Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 518 (1994) ("Paragraph [7] may mean that a group in an independent state acquires the right of secession if it lives under a regime not representing the whole people, or if the group suffers discriminatory treatment."); Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. INT'L & COMP. L. REV. 213, 237 (1992) ("The [Friendly Relations] Declaration can be interpreted to permit secession where an existing government does not act in compliance with the principles of equal rights and self-determination of peoples."); Robert McCorquodale, *Self-Determination Beyond the Colonial Context*, 4 AFR. J. INT'L & COMP. L. 592, 603–04 (1992) (explaining that, under the Friendly Relations Declaration, a state's right to territorial integrity and political unity can only be upheld if the state complies with the principle of self-determination of its peoples. "Thus any independent State that does not represent the whole population on its territory without discrimination . . . cannot reject a claim to [secessionist] self-determination on the basis

that it would infringe its territorial integrity or political unity."); Elysa L. Teric, *The Legality of Croatia's Right to Self-Determination*, 6 TEMP. INT'L & COMP. L. J. 403, 412–13 (1992) ("[The Friendly Relations Declaration] allows the principle of self-determination to be given priority over the principle of territorial integrity in special circumstances."); Ernst Petric, *Self-Determination, Security and Integrity of Sovereign States*, *in* SELF-DETERMINATION IN EUROPE: PROCEEDINGS OF AN INTERNATIONAL WORKSHOP 30 (Konrad Ginther & Hubert Isak, eds., 1991); Lena A. Demetriadou, *To What Extent is the Principle of Self-Determination a Right Under International Law? How Strictly its Framework has been or should be Defined?*, 6 CYPRUS L. REV. 3324, 3330 (1988) ("[Under the Friendly Relations Declaration] action to dismember an independent state might be permitted if the government does not represent the whole people."); Subrata Roy Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, *in* THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW, 94 (Frederick E. Snyder & Surakiat Sathirathai eds., 1987) ("[Principle 5 paragraph 7 of the Friendly Relations Declaration] provides that the defence against secession or dismemberment of the territorial or political unity is only available to 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* without distinction as to race, creed or colour."); A. M. Connelly, *The Right to Self-Determination and International Boundaries*, *in* XIV THESAURUS ACROASIUM 545, 548 (1985) (after surveying Principle 5 paragraph 7 of the Friendly Relations Declaration stating that, "[i]f a State does not comply with the principle of equal rights and self-determination of peoples, there may be circumstances in which action which has the effect of dismembering or impairing its territorial integrity or political unity is justified"); Don Johnson, *Self-Determination*, 3 GA J. INT'L & COMP. L. 145, 153 (1973) (concluding that the Friendly Relations Declaration prioritizes the territorial integrity of independent states except where a state denies its peoples the right to self-determination); M. K. Nawaz, *Bangladesh and International Law*, 11 INDIAN J. INT'L L. 251, 256 (1971) ("[Principle 5 paragraphs 1 and 7 of the Friendly Relations Declaration] indicate that the principle of self-determination is limited by territoriality only when States ensure conditions leading to the economic, social and cultural development of *all* peoples living in a State."); Doehring, *supra* note 4, at 66 (after reviewing Principle 5 paragraph 7 of the Friendly Relations Declaration stating that "a right to secession could . . . be recognized if the minority discriminated against is exposed to actions by the sovereign state power which consist in an evident and brutal violation of fundamental human rights"); Espiell, *supra* note 4, at 10 (noting that the Friendly Relations Declaration recognizes the need to preserve territorial integrity "but ties this concept to the requirement that the State must be 'possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'"); RAIČ, *supra* note 4, at 323 (after considering Principle 5 paragraph 7 of the Friendly Relations Declaration, observing that "[a] people is only entitled to secede from an existing State, under certain exceptional circumstances for the purpose of safeguarding that people's collective identity and the fundamental individual rights of its members, as well as to restore its freedom"); Vidmar, *supra* note 4, at 808 ("[Principle 5 paragraph 7 of the Friendly Relations Declaration] may be understood to suggest that, under certain circumstances, the territorial integrity limitation on the right of self-determination may not always be applicable."); Douglas Sanders, *Self-Determination and Indigenous Peoples*, MODERN LAW OF SELF-DETERMINATION, *supra* note 6, at 79 ("[According to paragraph 7 of the Friendly Relations Declaration] [a] denial of equality or human rights or self-government would give the people an option for independence. This position begins with the proposition that 'self-determination of peoples' applies equally to all peoples."); Christian Tomuschat, *Self-Determination in a Post Colonial World*, *in* MODERN LAW OF SELF-DETERMINATION, *supra* note 6, at 9–10 (noting that, according to the Friendly Relations Declaration, the

Ved Nanda, for instance, has written that

> a state has to meet the requirement of possessing a "government representing the whole people" before it is entitled to protection from "any action which would dismember or impair . . . [its] territorial integrity or political unity . . . ." Thus, under special circumstances, the principle of self-determination is to be accorded priority over the opposing principle of territorial integrity.[173]

Nanda concludes that, "a persuasive case can be made for recognizing the legitimacy of some secessionist movements in a non-colonial context."[174]

"principle of national unity and territorial integrity may have to yield if the State concerned is not possessed of a government 'representing the whole peoples belonging to the territory without distinction as to race, creed or colour'"); Fisher, *supra* note 8, at 283 ("The underlying rule [emerging from Principle 5 paragraph 7 of the Friendly Relations Declaration] is that a state's territorial integrity is to be respected as indivisible contingent upon the state respecting the rights and self-determination of all peoples within its borders."); Falkowski, *supra* note 30, at 233–34 ("The territorial integrity provision is subordinate to the duty that every state has to respect the right of all peoples to self-determination regardless of geographic location. [Principle 5 paragraph 7 of the Friendly Relations Declaration] does not forbid actions taken by peoples within a state to secure their right to self-determination [i.e., pursue UNC secession]."); RADAN, *supra* note 53, 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."); Sornarajah, *supra* note 106, at 54–55 ("The [Friendly Relations] Declaration recognizes a connection between equal protection of laws and the principle of self-determination in that it ensures the preservation of the territorial integrity of a state by rendering a state immune to the exercise of self-determination *only if* that state has protected the rights of all of its peoples."); Islam, *supra* note 146, at 458 (describing Principle 5 paragraph 7 of the Friendly Relations Declaration as a "compromise in the form of a checks-and-balance between the right of peoples to secession and the right of the state to territorial integrity"); Kooijmans, *supra* note 146, at 216 (after analyzing Principle 5 paragraph 7 of the Friendly Relations Declaration stating "the right of secession is not a normal emanation of the right to self-determination, but an *ultimum remedium*, to be resorted to only if all efforts to find a solution within the State structure have been to no avail and if local and international remedies have turned out to be fruitless"); Paust, *supra* note 146, at 7 (after noting the Friendly Relations Declaration, stating that "the prohibition of territorial dismemberment or impairment . . . applies only where the relevant state itself complies with the principle of equal rights and self-determination"); Murswiek, *supra* note 155, at 27 (after discussing Principle 5 paragraph 7 of the Friendly Relations Declaration noting that "[t]here must, at least, be a right of secession if it does not seem possible to save the existence of a people, which is the holder of the right of self-determination in a certain territory, except by secession from the existing State"); Tierney, *supra* note 159, at 205–06 ("[B]y qualifying the protection accorded to territorial integrity, the [Friendly Relations Declaration] logically implies that secession is permitted in some cases . . . ."); Kirgis, *supra* note 170, at 308 ("[T]he [Friendly Relations Declaration's] disclaimer of any intent to authorize the dismemberment of a state . . . is tied to the proposition of democratic government representing . . . all people belonging to the territory.").

173. Nanda, *supra* note 82, at 269–70.

174. *Id.* at 275.

Buchheit has similarly asserted that "paragraph 7 of . . . principle [5] seems to recognize, for the first time in an international document of this kind, the legitimacy of secession under certain circumstances."[175] He later contends that this development echoes the writings of Locke, Jefferson, and Wilson, namely, that the legitimacy of government derives from the consent of the governed, and that paragraph 7 recognizes that consent cannot exist "without the enfranchisement of all segments of the population."[176]

The significance of paragraph 7 was also noted by the International Commission of Jurists in its 1972 study, *The Events in East Pakistan 1971*. After stating that paragraph 7 gave primacy to the principle of territorial integrity, the jurists further remarked, "[i]f one of the constituent peoples of a state is denied equal rights and is discriminated against . . . their full right to self-determination will revive."[177]

Most recently, the importance of paragraph 7 was identified by Judge Abdulqawi Yusuf in the *Kosovo Advisory Opinion*.[178] After noting that paragraph 7 in no way grants an unqualified right to UNC secession, Judge Yusuf continued 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."[179]

Some scholars, however, argue against a reading of paragraph 7 that countenances a qualified right to UNC secession. Guyora Binder is one such example: "the Declaration recognized a right of secession not for all peoples at all, but for those territories that happened to be

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175. BUCHHEIT, *supra* note 121, at 92.

176. *Id.* at 93. Alternatively, Kaladharan Nayer traces this development to Article 21(3) of the Universal Declaration of Human Rights, which provides: "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." *See* Kaladharan Nayer, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 TEX. INT'L L. J. 321, 338 (1975).

177. INT'L COMM'N OF JURISTS, *East Pakistan Staff Study*, *cited in* RADAN, *supra* note 53, at 61.

178. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010, I.C.J. 618, 622 ¶¶ 11–12 (July 22) (separate opinion of Yusuf, J.).

179. *Id.* at 618, ¶ 12. *See also id.* at 523, ¶¶ 182–84 (separate opinion of Cançado-Trindade, J., supporting the existence of a qualified right to UNC secession). *But see id.* at 467, ¶¶ 21–25 (Koroma, J., dissenting) ("Not even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing state without its consent.").

recognized by the United Nations as colonies."[180] He later concludes that "[b]eyond the decolonization context . . . the Declaration *completely* absorbed the nationalist component of self-determination into the sovereignty of existing states."[181] Binder's assertions, however, are incompatible with the plain text and meaning of paragraph 7, and with Principle 5 more broadly. As detailed above, the Friendly Relations Declaration does not restrict its articulation of self-determination to colonial peoples or decolonization. Moreover, previous UN instruments, such as Article 2 of the Colonial Declaration and common Article 1 of the Economic Rights Covenant and Civil Rights Covenant, confirm that the self-determination of peoples does apply beyond the colonial context.

Nonetheless, the "anti-secession" conclusions drawn by Binder and others[182] beg the following questions: Why did paragraph 7 fail to

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180. Guyora Binder, *The Case for Self-Determination*, 29 STAN. J. INT'L L. 223, 238 (1993).

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

182. *See* Katherine Del Mar, *The Myth of Remedial Secession*, *in* STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 79, 94–95 (Duncan French ed., 2013) ("It is . . . problematic to contend that [Principle 5 paragraph 7 of the Friendly Relations Declaration] is the legal basis of a right to remedial secession, because such an argument is grounded in an overly expansive reading of a clause that is clearly restrictive in meaning."); Donald L. Horowitz, *A Right to Secede?*, *in* SECESSION AND SELF-DETERMINATION 50, 64 (Stephen Macedo & Allen Buchanan eds., 2003) ("The only reference to self-determination in the proviso is to "self-determination of the peoples as described above"; none of the descriptions above [paragraphs 1–6 of the Friendly Relations Declaration] refer to self-determination outside the context of decolonization . . . . This usage fits the purpose of the proviso [in paragraph 7] which is to restrict the application of the language preceding it, rather than to create new rights."); Patrick J. Monahan, *The Law and Politics of Quebec Secession*, 33 OSGOODE HALL L. J. 1, 20–21 (1995) ("The 1970 Declaration on Friendly Relations, after affirming the right of self-determination, makes plain that this principle does not compromise the territorial integrity of existing states."); Fox, *supra* note 6, at 740 (arguing that the Friendly Relations Declaration does not grant an "affirmative right to secession for groups living under nondemocratic regimes"); SHAW, *supra* note 6, at 187 (arguing that Principle 5 paragraph 7 of the Friendly Relations Declaration does not create a right to UNC secession); Thornberry, *supra* note 6, at 118 (noting that "[t]he rival arguments [relating to Principle 5 paragraph 7 of the Friendly Relations Declaration] seem to deconstruct each other . . . ."); van der Vyver, *Quebec*, *supra* note 6, at 22–23 (after reviewing Principle 5 paragraph 7 of the Friendly Relations Declaration arguing that "[i]t is important to note that a people's right to self-determination does not include a right to secession, not even in instances where the powers that be act in breach of a minority's legitimate expectations"); Wilson, *supra* note 6, at 464–65 (after reviewing Principle 5 paragraph 7 of the Friendly Relations Declaration arguing that it does not provide a right to secession). Other scholars also seem to deny the secessionist implications of Principle 5 paragraph 7 but are less explicit in their reasoning. *See* Simone F. van den Driest, *Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law* 62 NETH. INT'L L. REV. 329, 340–32, 355–56, 360 (2015) (evincing general skepticism about a remedial right to UNC secession in international law); Antonello Tancredi, *Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia*, 18 ITALIAN Y.B. INT'L L.

explicitly endorse a qualified right to UNC secession? Why must the qualified right to UNC secession be established by an *a contrario* reading?[183] The answers lie in the declaration's drafting, which, as the *travaux préparatoires* reveal, was split between opposing viewpoints: those states that favored the inclusion of a qualified right to UNC secession and those states that did not. The communist bloc, with its traditionally more open stance towards self-determination, argued in favor of an inherent right to UNC secession.[184] This was opposed by many Western and African states, however, which felt that self-determination did *not* include such a right, qualified or otherwise. Confronted with these opposing viewpoints, the representative for the Netherlands suggested a compromise that allowed for UNC secession in circumstances where "basic human rights and fundamental freedoms . . . were not being respected."[185] To satisfy the group of states opposed to any right of UNC secession, paragraph 7 was thus crafted to avoid any overt mention of UNC secession, even though an *a contrario* reading reveals that it was implicitly made available under certain circumstances.[186]

Principle 5 of the Friendly Relations Declaration therefore provides a right of UNC secession. This right is *only* exercisable by peoples who are subjected to deliberate, sustained, and systematic discrimination on the grounds of "race, creed or colour," which includes

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37, 39 (2008) (after reviewing the secessionist implications of Principle 5 paragraph 7 of the Friendly Relations Declaration, stating: "[o]ne may wonder . . . whether this view stands the test of systematic and subjective interpretation and whether it has ever corresponded to State practice"); Hurst Hannum, *The Right to Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 776–77 (1998) ("There simply is no right of secession under international law . . . [o]f course, there is no prohibition in international law against secession either."). Higgins, after mentioning paragraph 7, concludes that state sovereignty and territorial integrity prevails over a right to secession. *See* HIGGINS, *supra* note 88, at 121. 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 disaffected minorities within states." James Myall, *Non-Intervention, Self-Determination and the New World Order*, 67 INT'L AFF. 421, 424 (1991).

183. Rosenstock has poignantly observed that Principle 5 of the Friendly Relations Declaration "contains some tortured phraseology." Rosenstock, *supra* note 136, at 733.

184. Unqualified in the sense that a people need only decide to pursue UNC by referendum. No additional criteria, such as rampant human rights violations, or "discrimination of 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 and national state." *See* BUCHHEIT, *supra* note 121, at 91.

185. RAIČ, *supra* note 4, at 320.

186. As Rosenstock has correctly observed, the fact that paragraph 7 requires an *a contrario* reading to reveal the legitimacy of secession "should not be misunderstood to limit the sweep and liberality of the paragraph." Rosenstock, *supra* note 136, at 732.

racial, religious, linguistic, cultural, and customary discrimination.[187] The qualified right of UNC secession contained in the Friendly Relations Declaration is therefore remedial in nature, only applicable to peoples that are systematically persecuted or oppressed.

Before concluding, a final point requires mention, namely, that the textual content of the Friendly Relations Declaration has been vicariously integrated into numerous subsequent declaratory General Assembly resolutions, such as Article 7 of the 1974 Definition of Aggression,[188] Article II(6) of the 1982 Manila Declaration on the Peaceful Settlement of International Disputes,[189] Article 3 of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,[190] and Article 3 of 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.[191] These instruments can thus be considered to incorporate the same right to UNC secession found in Principle 5 of the Friendly Relations Declaration.

E. *The Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*

In October 1995, the General Assembly adopted the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (Fiftieth Anniversary Declaration).[192] The Fiftieth Anniversary Declaration was a modernizing instrument, confirming the content of the Friendly Relations Declaration, and correlatively, that older exclusively colonial conceptions of self-determination were outmoded.

Article 1 of the Fiftieth Anniversary Declaration provides that the United Nations 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*

187. G.A. Res. 2625, *supra* note 3.
188. G.A. Res. 3314 (XXIX), ¶ 3 (Dec. 14, 1974).
189. G.A. Res. 37/10, Nov. 15, ¶ 6 (Nov. 15, 1982).
190. G.A. Res. 42/22, ¶ 3 (Nov. 18, 1987).
191. G.A. Res. 43/51, ¶ 3 (Dec. 5, 1988).
192. G.A. Res. 50/6, *supra* note 76, ¶ 1 (emphasis added).

representing the whole people belonging to the territory without distinction of any kind.[193]

Article 1 reaffirms the right of *all* peoples to self-determination and expressly endorses the Friendly Relations Declaration, repeating—with minor alteration—the content of Principle 5 paragraph 7.[194] The critical difference between Article 1 and Principle 5 paragraph 7 is the qualification clause at the end of both provisions. The latter speaks of self-determination as requiring no distinction as "to race, creed or colour,"[195] whereas the former is broader in scope, requiring no distinction "of any kind."[196] Article 1 thus removed the ambiguity associated with the words "race" "creed" and "colour," confirming that *any* form of discrimination against a people is unacceptable. This necessarily includes racial, linguistic, cultural,

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193. *Id.* (emphasis added).

194. The text of Article 1 was substantially based on an earlier non-General Assembly document, The Vienna Declaration and Programme of Action, adopted unanimously by the UN World Conference on Human Rights in June 1993. Article 2 of the Vienna Declaration and Programme of Action states:

> [1] *All peoples have the right of self-determination.* By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.
>
> [2] Taking into account the particular situation of peoples under *colonial or other forms of alien domination or foreign occupation*, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.
>
> [3] In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not 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 and *thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.* (emphasis added)

The Vienna conference was attended by 171 states, and in total attracted 7000 participants, including states representatives, international human rights experts, academics, and representatives of more than 800 non-governmental organizations. *See World Conference on Human Rights*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.unhchr.ch/html/menu5/wchr.htm (last visited Sept. 22, 2016) [https://perma.cc/2KL5-7D4V] (archived Sept. 22, 2016). *See generally*, Ved P. Nanda, *Self-Determination and Secession Under International Law*, 29 DEN. J. INT'L L. & POL'Y 305, 310 (2001) [hereinafter Nanda, *Secession*].

195. G.A. Res. 2625, *supra* note 3.

196. G.A. Res. 50/6, *supra* note 76, ¶ 1.

customary, religious, or other forms of discrimination along ethnic or national lines.[197] Accordingly, peoples within sovereign states who are subjected to sustained and systematic discrimination "of *any* kind" are, as a remedy of last resort, entitled to pursue UNC secession.[198]

F. *United Nations Declaration on the Rights of Indigenous Peoples*

In September 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Declaration).[199] The instrument had an extraordinarily lengthy drafting period,[200] but when complete was "groundbreaking"[201] in that it affirmed that indigenous peoples were entitled to the right of self-determination, including the right to autonomy. By so doing, it further consigned to obsolescence the outdated colonial-based conception of self-determination.

Article 3 of the Indigenous Declaration provides that "[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[202]

Article 4 continues by noting that "[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal or local affairs,

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197. Nanda, *Secession*, *supra* note 194, at 324–25.

198. As with the Friendly Relations Declaration, there would have to be no prospect for resolution within the existing state structure, a sufficient temporal nexus between the discrimination and the claim for UNC secession, an explicit and meaningful undertaking by the new government on the future protection of any potential minorities and the fulfilment of the prerequisites for statehood.

199. G.A. Res. 61/295, *supra* note 3, at 1. For a history of the Indigenous Declaration's drafting, see Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1159–66 (2008); Claire Charters, *The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples*, 4 N.Z. Y.B. INT'L L. 121, 121–31 (2007); Jon Beidelschies, note, *The Impact of the United Nations Declaration on the Rights of Indigenous Peoples on Wisconsin Tribes*, 26 WIS. INT'L L.J. 472, 481–84 (2008); SUMMERS, PEOPLES, *supra* note 4, at 253–56. For a history of the recognition of indigenous peoples in international law more generally, see J. K. DAES, HUMAN RIGHTS AND INDIGENOUS PEOPLES 43–57 (2001).

200. Work began in 1982 on the draft. It was a "long and difficult process." *See* SUMMERS, PEOPLES, *supra* note 4, at 254.

201. Helen Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 HARV. HUM. RTS. J. 49, 72 (2012). Coulter has similarly observed "[t]he recognition of the right of self-determination in the Declaration is a breakthrough of great importance in the law of self-determination, probably the most important development of the right since the era of decolonization." Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 2 (2010).

202. G.A. Res. 61/295, *supra* note 3.

as well as ways and means for financing their autonomous functions."[203] As autonomy or self-government does not indicate a change of sovereignty throughout a territory,[204] Article 4 fails to provide any grounds for UNC secession.

Notwithstanding the above, it must be considered whether the denial of autonomy to indigenous peoples may constitute potential grounds for UNC secession. In this respect, Article 46(1) draws an explicit link between the content of the Indigenous Declaration and the UN Charter, suggesting that the Declaration does not authorize "any activity or any act contrary to the Charter" especially those which would "impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[205] It will be recalled that the UN Charter does not provide peoples (indigenous or otherwise) with a *right* to self-determination, and that, furthermore, it provides no right to UC or UNC secession. Rather, the UN Charter preferences the territorial integrity of states, including the non-self-governing territories of metropolitan powers. *A priori*, Article 46(1) would seem to prohibit UNC secession for indigenous peoples.[206]

This conclusion, however, is negated by Article 45, which asserts that "[n]othing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future."[207] If, as will be argued later in this Article,[208] it is

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203. *Id.*

204. *See* Anderson, *supra* note 1, at 385–86, 388 ("Autonomy, defined as the power of a sub-state region to regulate its own affairs by enacting legal rules but without a transfer of sovereignty.").

205. G.A. Res. 2625, *supra* note 3.

206. For articulation of this position see Fromherz who has suggested that "[g]iven Article 46(1) and the general disfavour with which international law views the recognition of newly formed states, any worry about the DRIP being used in an even marginally effective way to invoke 'secession' rights seems extreme at best." Noteworthy though is that Fromherz does not discuss the potential interaction between Articles 46(1) and 45 (considered *infra*). Christopher J. Fromherz, *Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA L. REV. 1341, 1346–47 (2008). Tsosie also fails to consider the potential interaction between Articles 46(1) and 45. Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics and Human Rights*, 87 WASH. L. REV. 1133, 1194–95 (2012). Boronow also seems inclined to overlook the potential interaction between Articles 46(1) and 45, although she does acknowledge that "absent extreme circumstances, indigenous self-determination as recognized by international law is likely limited to the internal right." Clare Boronow, *Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to a Remedy*, 98 VA. L. REV. 1373, 1381 (2012). Eide has stated that Article 46(1) "rule[s] out any interpretation of the right to self-determination of indigenous peoples allowing for secession." Asbjørn Eide, *Indigenous Self-Government in the Arctic, and Their Right to Land and Natural Resources*, 1 Y.B. POLAR L. 245, 255 (2009).

207. G.A. Res. 61/295, *supra* note 3 at 3.

208. *See infra* Part V.

accepted that international customary law contains a qualified right to UNC secession for peoples subject to deliberate, sustained, and systematic discrimination in the form of human rights abuses *in extremis*, it follows that this pre-existing customary law right would be preserved by Article 45.[209] This trajectory of thinking would appear to

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209. Daes, after noting that "[i]ndigenous peoples are unquestionably 'peoples'" and that the modern law of self-determination may provide peoples with a qualified right to UNC secession as an *ultimum remedium*, argues "the meaning of self-determination in the context of the U.N. Draft Declaration on the Rights of Indigenous Peoples should be understood in accordance with this new meaning." Erica-Irene Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 1, 6, 8 (1993). For identical reasoning, see Erica-Irene Daes, *The Right of Indigenous Peoples to "Self-Determination" in the Contemporary World Order*, *in* SELF-DETERMINATION: INTERNATIONAL PERSPECTIVES 47, 50–51 (Donald Clark & Robert Williamson eds., 1996). Myntti has propounded an analogous opinion:

> [I]ndigenous peoples are evidently peoples at least in the social, cultural, and ethnological meaning of the term. They may also be peoples for the purpose of the international law of self-determination of peoples. This does not mean that they would be entitled to claim the right of self-determination in its external sense, that is, in the form of secession. Only indigenous peoples – and other groups – in a state with a profoundly undemocratic or repressive government may claim this right.

Kristian Myntti, *The Right of Indigenous Peoples to Self-Determination and Effective Participation*, *in* OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLE TO SELF-DETERMINATION, 114 (Pekka Aikio & Martin Scheinin eds., 2001). Borgia and Vargiu have similarly suggested that the Indigenous Declaration "equated indigenous peoples with any other people in international law" and that "nothing in theory prevents indigenous people [from exercising] the right of external self-determination in case of violations of their human rights." Fiammetta Borgia & Paolo Vargiu, *The Inuit Declaration on Sovereignty in the Artic: Between the Right to Self-Determination and a New Concept of Sovereignty?*, 4 Y.B. POLAR L. 189, 202 (2012). The prospect that a qualified right to UNC secession might accrue to indigenous peoples under the Indigenous Declaration has also been noted by Titanji: "[w]here indigenous peoples are not given the possibility to exercise their right of self-determination within the nation state, they should be allowed to exercise their right of external self-determination or secession." Ernest Duga Tatami, *The Right of Indigenous Peoples to Self-Determination Versus Secession: One Coin, Two Faces*, 9 AFR. HUM. RTS. L. J. 52, 71–72 (2009). That the Indigenous Declaration may enshrine a qualified right to UNC secession for indigenous peoples was noted by New Zealand, Australia and the United States during debate in the General Assembly's Third Committee (human rights). In a joint statement delivered by New Zealand, it was suggested that:

> [T]he provisions for articulating self-determination for indigenous peoples . . . inappropriately reproduce Article 1 of the Covenants. Self-determination . . . therefore could be misinterpreted as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States.

John R. Crook, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law*, 101 AM. J. INT'L L. 185, 212

have been evinced by the Australian delegation during the Indigenous Declaration's drafting process, which stated that "a right to [UNC] secession will only arise where a government is guilty of gross and systematic abuses of the human rights of a group which could be categorised as a people."[210] A similar conclusion was drawn by the World Council of Indigenous Peoples, which asserted that a right to UNC secession would arise if a state were "so abusive and unrepresentative . . . that the situation is tantamount to classic colonialism."[211]

G. *Summation of United Nations Instruments*

Examination of the foregoing UN instruments reveals that the law of self-determination includes a qualified right to UNC secession. This right has its genesis with Principle 5 paragraph 7 of the Friendly Relations Declaration, and has been reinforced by Article 1 of the Fiftieth Anniversary Declaration.

Prior to the Fiftieth Anniversary Declaration, legal interpretations of "peoples" as only connoting non-self-governing territories, and of "self-determination" as only operationalizing UC secession, abounded. No longer are such outmoded interpretations sustainable. Whatever doubts may have lingered about the applicability of "peoples" and "self-determination" beyond the colonial context in light of the Fiftieth Anniversary Declaration have been obliterated by the Indigenous Declaration.

Although the term "peoples" since its promulgation in the UN Charter has encompassed sub-state national groups,[212] it was not until after the Friendly Relations Declaration and Fiftieth Anniversary Declaration that such groups were permitted to strive for UNC secession in the event of deliberate, sustained, and systematic human

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(2007). *See also* Fromherz, *supra* note 206, at 1344–50 (discussing the objections of Canada, Australia, New Zealand, and the United States to the Indigenous Declaration).

210. The Australian Delegation to the UN Inter-Sessional Working Group on a Draft Declaration, *Self-Determination – The Australian Position*, ¶¶ 3–4, U.N. Doc. E/CN.4/1995/WG.15/2/Add.2 (Oct. 10, 1995); *see also* SUMMERS, PEOPLES, *supra* note 4, at 269.

211. Inter-Sessional Working Group on Draft Declaration, Statements by International Indian Treaty Council, the Saami Council, Service, Peace and Justice in Latin America, and the World Council of Indigenous Peoples ¶ 11, U.N. Doc. E/CN.4/1995/WG.15/4 (1995); *see also* SUMMERS, PEOPLES, *supra* note 4, at 269.

212. *See* UNCIO XVIII, 657–58 (discussing definitions and usage of the words "peoples," "state," and "nation"). Arguments by Kelsen and Emerson, therefore, that the word "peoples" refers, by necessity, to the entire population of a state, are incorrect. *See* RUPERT EMERSON, FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES 301 (1960); HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 51–52 (1951). For lively discussion of this point, see DUURSMA, *supra* note 83, at 14–15.

rights abuses by the existing state.[213] The contemporary right of peoples to self-determination has therefore evolved to permit a qualified right to UNC secession for oppressed sub-state national groups as an *ultimum remedium*. This development is commensurate with the growing emphasis on human rights and peremptory norms such as the prohibition on torture, apartheid, racism, genocide, and denial of self-determination in the late twentieth and early twenty-first centuries.[214]

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213. To be clear, the textual articulation in the Friendly Relations Declaration and Fiftieth Anniversary Declaration does not specify the necessity of human rights abuses *in extremis*— instead both human rights abuses *in moderato* and *in extremis* are captured. However, state practice in terms of physical acts and omissions, especially acts of recognition in relation to UNC secessionist disputes, indicates that a customary law right to UNC secession is only available in response to human rights abuses *in extremis*. This is discussed in Part V below.

214. For scholars who have asserted that self-determination is a peremptory norm, see Anaya, *supra* note 4, at 132 ("[I]t is frequently held that self-determination is a generally applicable norm of the highest order within the international system."); Berman, *supra* note 4, at 278; Blay, *supra* note 4, at 275 ("[S]elf-determination has emerged as an operative legal right in international law and has arguably acquired the status of *jus cogens*."); Beres, *supra* note 4, at 1; CASSESE, *supra* note 4, at 140 ("[S]elf-determination constitutes a peremptory norm of international law."); Doehring, *supra* note 4, at 70 ("The right of self-determination is overwhelmingly characterized as forming part of the peremptory norms of international law."); Ermacora, *supra* note 4 at 325; Evison, *supra* note 4, at 98 ("[T]he right of self-determination can be considered *jus cogens*."); HANNIKAINEN, *supra* note 4, at 421; Leathley, *supra* note 4, at 177 ("As a norm of *jus cogens* the right to self-determination has a status higher than any other in international law."); Linderfalk, *supra* note 4, at 373–74; Moris, *supra* note 4, at 204 ("Today, the right to self-determination is considered *jus cogens* . . . ."); ORAKHELASHVILI, *supra* note 4, at 51 ("The right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance."); Parker & Neylon, *supra* note 4, at 440–41 ("The right to self-determination . . . is a *jus cogens* norm."); RAIČ, *supra* note 4, at 289, 444; Richardson, *supra* note 4, at 190 ("The self-determination of peoples has evolved into a principle of international *jus cogens* . . . ."); Rodriguez-Orellana, *supra* note 4, at 1406 ("[T]he development of self-determination law has become part of *jus cogens* . . . ."); Tabak, *supra* note 4, at 525 ("[T]here exists general agreement that the right of peoples to self-determination is a norm of *jus cogens* . . . ."); Vidmar, *supra* note 4, at 807; *see also Barcelona Traction*, *supra* note 4 (separate opinion of Ammoun, J.) (describing the right of self-determination as an "imperative [rule] of law"). *But see* Hannum, *supra* note 4, at 31 ("[I]t is debatable whether the right of self-determination is *jus cogens* . . . ."); POMERANCE, *supra* note 4, at 70–71 ("The suggestion that self-determination is a principle of *jus cogens* is . . . without any firm legal foundation."); SUMMERS, PEOPLES, *supra* note 4, at 84 ("[S]elf-determination [is] problematic as a peremptory norm."); Summers, *Status*, *supra* note 4, at 287 ("[A]lthough self-determination proposes that legal obligations which run counter to it are invalid, the idea that this can be explained by *jus cogens* is contradicted by the available evidence."); Weisbrud, *supra* note 4, at 31 ("[I]t is debatable whether the right to self-determination is *jus cogens* . . . .").

V. THE LEGAL EFFECT OF UNITED NATIONS INSTRUMENTS

The preceding Part discusses two types of instruments: treaties and declaratory General Assembly resolutions. The binding nature of the former, including the UN Charter and the Human Rights Covenants, has been universally recognized by international lawyers and states alike, a fact largely explicable by the consensual or quasi-contractual nature of treaty adoption. It can be readily assumed, therefore, that the contributions of both the UN Charter and the Human Rights Covenants to the law of self-determination are legally valid and impose binding obligations on signatory states.[215] However, as argued above, the UN Charter and the Human Rights Covenants do not provide grounds for UNC secession. Rather, they only guarantee the right of colonial or non-self-governing territories to UC secession. Hence, in order to determine the legality of UNC secession, one is clearly forced to rely on the exhortations of UN General Assembly resolutions, particularly, the Friendly Relations Declaration and the Fiftieth Anniversary Declaration.

The legal potency of General Assembly resolutions has been the subject of considerable scholarly debate. One school of thought, sometimes referred to as the "traditional" school, denies that General Assembly resolutions have legal effect.[216] The other school, sometimes referred to as the "progressive" school, argues that General Assembly resolutions do have legal effect.[217] Although the General Assembly is

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215. They probably also impose binding obligations on non-signatory states as customary law. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, 80–81 (1989) (arguing that when a principle becomes a customary norm, even states that are not parties to the originating instrument are bound by it); Louis Sohn, *Generally Accepted International Rules*, 61 WASH. L. REV. 1073, 1077–78 (1986); Daniel Thürer & Thomas Burri, *Self-Determination*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 10 (2008), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873?rskey=23fAzT&result=5&prd=EPIL [https://perma.cc/K8L8-9637] (archived Dec. 15, 2016); DUURSMA, *supra* note 83, at 78; Franck, *Governance*, *supra* note 123, at 58 (suggesting that the contributions of the Human Rights Covenants to the law of self-determination are binding on non-signatory states).

216. *See* LEO GROSS, *The Development of International Law Through the United Nations*, *in* ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 183, 214–20 (1984); G. W. Haight, *The New International Economic Order and the Charter of Economic Rights and Duties of States*, 9 INT'L L. 591, 597 (1975) ("Under the United Nations Charter the General Assembly may discuss and make recommendations, but it is not a lawmaking body and its Resolutions . . . do not make law or have binding effect."); Arangio-Ruiz, *supra* note 143, at 445 ("In any cases other than those in which . . . the Assembly is endowed with a power of binding enactment it can only deliberate without binding effect.").

217. *See* BLAINE SLOAN, UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS IN OUR CHANGING WORLD 53–93 (1991); OBED Y. ASMOAH, THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 2–3 (1966)

not a legislature, it is nonetheless submitted here that there are two principal ways resolutions influence the law-making process: as evidence of state practice and by indicating international consensus.[218]

A. *General Assembly Resolutions as State Practice*

Article 38(1)(b) of the International Court of Justice (ICJ) Statute lists "international custom, as evidence of a general practice," as one source of international law.[219] Michael Akehurst has defined state practice as "any act or statement by a State from which views about customary law can be inferred; it includes physical acts, claims, declarations *in abstracto* (such as UN General Assembly resolutions), national laws, national judgments and omissions."[220] Similarly, Kenneth Bailey has maintained that "customary law consists of the rules established by the general practice of states, which certainly includes their diplomatic acts and public pronouncements."[221] The

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("The Assembly does and can make binding decisions."); Mark E. Ellis, *The New International Economic Order and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited*, 15 CAL. W. INT'L L. J. 647, 684 (1985) ("The traditional arguments against recognizing General Assembly resolutions as law-creating are not persuasive."); 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) (noting that General Assembly resolutions "often have undeniable legal or political effects quite out of proportion to their formal recommendatory status).

218. 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 217, at 41. Similarly, I. I. 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 Organizations in the International Normative System*, *in* INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM 31, 35 (W. E. Butler ed., 1987); *see also* Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, 32 VA. J. INT'L L. 583, 604 (1992) ("At a minimum, the resolutions are now seen as evidence of state practice and thereby customary international law."); BOKOR-SZEGÖ, *supra* note 14, at 71–72; LUPIS, *supra* note 14, at 13–14.

219. *See* CRAWFORD, *supra* note 70, at 23; SLOAN, *supra* note 217, at 53.

220. *See* Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 53 (1975). Interestingly, the same scholar at page fourteen considers that "a single act involving fifty states provides stronger proof that a custom is accepted than ten separate acts involving ten separate states." *See also* Rein A. Mullerson, *Sources of International Law: New Tendencies in Soviet Thinking*, 83 AM. J. INT'L L. 494, 506–07 (1989) (arguing that the principles non-use of force and non-interference in internal affairs constitute international customary law even though they are regularly violated because the vast majority of states condemn such violations).

221. Kenneth Bailey, *Making International Law in the United Nations*, 61 PROC. AM. SOC. INT'L L. 233, 235 (1967); CRAWFORD, *supra* note 70 at 24 ("[S]ources of custom are manifold and include: diplomatic correspondence, policy statements, press releases, the opinions of government legal advisers, official manuals on legal questions . . . the practice of international organs, and resolutions relating to legal questions in UN organs,

words "state practice" in Article 38(1)(b) should thus be construed widely, rather than interpreted restrictively as limited only to physical acts. Accordingly, state acceptance of General Assembly resolutions clearly serves to qualify them as legitimate sources of international law.

This is especially the case when resolutions "declare" the law—whether customary or general principles—and the resolution is adopted by consensus (as with the Friendly Relations Declaration) or by unanimous or near unanimous vote (as with the Fiftieth Anniversary Declaration).[222] In such cases, there is a strong presumption that the rules and principles contained within the declaration are legally binding obligations.[223] This was cogently highlighted by the ICJ in *Nicaragua v. United States of America*:[224]

> *[O]pinio juris* may, though with all due caution, be deduced, *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.[225]

The court later continued: "[a]s already observed, the adoption by States of [the Friendly Relations Declaration] affords an indication of their *opinio juris* as to customary international law on the question."[226]

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notably, the General Assembly."); Dixon shares a similar view. *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 32–33 (Oxford Univ. Press 7th ed., 2013) ("As a guideline, 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 in the General Assembly), national legislation and the practice of international organisations."); Sloan suggests that as international organizations are subjects of international law, organizational practice bears upon the creation of custom. *See* SLOAN, *supra* note 217, at 72.

222. SUMMERS, PEOPLES, *supra* note 4, at 222.

223. BOKOR-SZEGÖ, *supra* note 14, at 73–74; SLOAN, *supra* note 217, at 47, 113, 151. *But see* Arangio-Ruiz, *supra* note 143, at 449, (discussing the (unusual) view that declarations have no more force than recommendations).

224. Military and Paramilitary Activities in and against Nicaragua (Nicar. v U.S.) Judgment, 1986, I.C.J. Rep. 14 (June 27) [Hereinafter *Nicaragua*].

225. *Id.* at ¶ 188 (per Singh (President), De Lacharriere (Vice President), Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Jennings, Mbaya, Bedjaoui, Ni, Evenson, & Colliard, JJ.).

226. *Id.* at ¶ 191 (per Singh (President), De Lacharriere (Vice President), Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Schwebel, Jennings, Mbaya, Bedjaoui, Ni, Evenson, & Colliard, JJ.); *see also* Thomas Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations* 81 AM. J. INT'L L. 116, 119 (1987). Franck has opined that

However, *Nicaragua* also indicates that for *opinio juris* to be transformed into concrete and binding rules of customary law, it must be supported by state practice, specifically, physical acts. Put another way, the strong presumption that the rules and principles contained within declarations are legally binding obligations *can* be overcome by consistent state practice to the contrary.[227]

"[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." Whilst this is a valid observation, as Judge Schwebel pointed out in a 1972 Hague lecture, the Friendly Relations Declaration was "adopted by acclamation and accepted by the General Assembly as declaratory of international law." Schwebel holds the same opinion regarding the Definition of Aggression. *See* Judge Stephen M. Schwebel, *Aggression, Intervention and Self-Defence in Modern International Law*, 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." *See* Oscar Schachter, *Just War and Human Rights (Second Annual Blaine Sloan Lecture)*, 1 PACE Y.B. INT'L L. 1, 8 (1989).

227. *Nicaragua*, *supra* note 224 ¶ 205 (the Court noted "[n]otwithstanding 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?"); *Id.* ¶ 202 ("The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice."); *Id.* ¶ 206 ("Before reaching a conclusion on the nature of prohibited intervention, the Court must be satisfied that State practice justifies it."); *see also* P. P. Rijpkema, *Customary International Law and the Nicaragua Case*, 20 NETHERLANDS Y.B. INT'L L. 92, 105 (1989). A very similar view was earlier expressed by Rosenstock, who in 1978 declared: "[i]n the exceptional cases in which a General Assembly resolution may contribute to the development of international law, it can do so only if the resolution gains virtually universal support, if Members of the General Assembly share a lawmaking or law-declaring intent—and if the content of that resolution is reflected in general state practice. The General Assembly Resolution on the Principles of International Law Concerning Friendly Relations and Cooperation Among States may be an authoritative interpretation of international law, adopted as it was unanimously and stated as it was by many Members to be such—at any rate, if it is supported by state practice." *See* John A. Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 375, 377 (1978) (citing Rosenstock's Nov. 11, 1977 statement concerning the Report of the International Law Commission on Its Twenty-Ninth Session); *See also* Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 27–29 (1992); Christoph Schreuer, *Recommendations and the Traditional Sources of International Law*, 20 GERMAN Y.B. INT'L L. 103, 107–08 (1977) (explaining that subsequent state conduct is materially important as to whether a recommendation constitutes binding customary law); Jaber, *supra* note 172, at 936–37, 940–41; Ellis, *supra* note 217, at 688–91 (stating that resolutions do not become binding automatically when passed and asserting the importance of taking subsequent state practice into account).

B. *General Assembly Resolutions as Consensus*

Moving beyond the traditional sources of international law contained in Article 38(1) of the ICJ Statute, it is arguable that General Assembly resolutions also constitute sources of law purely on the basis of consensus.[228] Richard Falk, for instance, in his article, *On the Quasi-Legislative Competence of the General Assembly*, has postulated that consensus is replacing consent as the basis for international legal obligations.[229] Other scholars, such as Anthony D'Amato, appear to go even further, unequivocally declaring that consensus *is* international law.[230] Thus, a resolution such as the Friendly Relations Declaration, which was adopted by consensus, may, *ipso facto*, be regarded as legally authoritative and binding.

C. *Conclusion*

To simply categorize General Assembly resolutions as legally impotent—especially those which evidence normative intent—is incorrect. In light of the ICJ's ruling in *Nicaragua*, and the other authorities cited above, it is submitted here that all resolutions adopted by consensus (such as the Friendly Relations Declaration) or by unanimous or near unanimous vote (such as the Fiftieth Anniversary Declaration) establish an almost conclusive presumption that their content is binding. It follows, therefore, that the qualified right to UNC secession contained in Principle 5 paragraph 7 of the Friendly Relations Declaration and in Article 1 of the Fiftieth Anniversary Declaration is a presumptively binding rule of international law. As indicated by the ICJ in *Nicaragua*, however, this presumption can be invalidated by consistent state practice to the contrary.

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228. Generally accepted to connote the absence of formal objection. *See* Eric Suy, *Consensus*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 760 (Rudolf Bernhardt ed., 1992); SLOAN, *supra* note 201, at 87 ("[C]onsensus is a method for reaching a decision without voting in the absence of formal objection"); Anderson, *supra* note 81, at 391–92.

229. Richard Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782, 782–91 (1966); *see also* Schreuer, *supra* note 227, at 116. *But see* Nicholas G. Onuf, *Professor Falk on the Quasi-Legislative Competence of the General Assembly*, 64 AM. J. INT'L L. 348, 351–52 (1970).

230. 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) (arguing that there are situations in which consent to a General Assembly vote creates a legally binding obligation absent state practice). *But see* Nicholas 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).

Although it is beyond the scope of the present Article to provide an account of state practice in relation to UNC secession, it is submitted that UNC secessionist case studies such as Bangladesh, The Turkish Republic of Northern Cyrpus (TRNC), Abkhazia, South Ossetia, Transnistria, and Kosovo collectively indicate that only when human rights abuses *in extremis* (ethnic cleansing, mass killings, or genocide) have occurred will such a right be legally perfected. This means that human rights abuses *in moderato* (political, cultural, or racial discrimination), however deplorable, will not concretely ground a right to UNC secession in international customary law.[231] This is despite the wide textual ambit of Principle 5 paragraph 7 of the Friendly Relations Declaration and Article 1 of the Fiftieth Anniversary Declaration, which provide a right to UNC secession in the event of deliberate, sustained, and systematic human rights abuses *in moderato* and *in extremis*.

VI. NORMATIVE EVALUATION

The Friendly Relations Declaration and the Fiftieth Anniversary Declaration provide a textual right to UNC secession in response to sustained and systematic human rights abuses *in moderato* and *in extremis*. This means that both instruments correspond philosophically with the "remedial rights only"[232] approach to UNC secession. As Allen Buchanan has observed, this approach treats UNC secession as "a remedy of last resort for persistent and grave injustices"[233] but is nonetheless "permissive"[234] with respect to consensual secession.[235] Although the remedial-rights-only philosophical approach enjoys a long scholarly lineage, it is vulnerable to normative critique, particularly on the grounds of requiring human suffering before UNC secession is justified.

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231. Anderson, *supra* note 81, at 394–95; Anderson, *supra* note 96, at 232; Anderson, *supra* note 164, at 12, 30–40, 71–87. For a similar appraisal of the minimal state practice in support of UNC secession see Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST ANTONY'S INT'L REV. 37, 37–51 (2010).

232. ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 351 (2004) [hereinafter BUCHANAN, JUSTICE].

233. *Id.*

234. *Id.* at 352.

235. Allen Buchanan, *Theories of Secession*, 26 PHILOSOPHY AND PUBLIC AFFAIRS 31, 36 (1997) [hereinafter Buchanan, *Theories of Secession*]; BUCHANAN, JUSTICE, *supra* note 232, at 352.

A. *The Remedial-Rights-Only Philosophical Approach*

The antecedents of the remedial-rights-only approach to UNC secession can perhaps be traced to the Dutch jurist, Hugo Grotius, who, although holding that civil authority was to be respected, nevertheless countenanced an inherent right to resist orchestrated governmental oppression: "I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the last resource of necessity in such a way as meanwhile not to abandon consideration of the common good."[236]

The Swiss philosopher, Emmerich de Vattel, also supported the general right of citizens to resist a tyrannical sovereign. He argued that a right to resistance is legitimate in "a case of clear and glaring wrongs [such as] when a prince for no apparent reason attempts to take away our life, or deprive us of things without which life would be miserable."[237] Vattel was clear though that so long as a sovereign did not violate the "fundamental laws," a right to resistance would remain illegitimate.[238] In the absence of oppression, a state may only be dissolved by the unanimous decision of all citizens: "since compacts may be broken by the common consent of the parties, if the individuals who compose a Nation unanimously agree to break the bonds which unite them, they may do so and thereby destroy the State or Nation."[239] Presumably, a plebiscite would be required to determine unanimity.

John Locke did not explicitly discuss a right to UNC secession, but he did indicate, like Vattel, that where legislative authority assumed a tyrannical character, a right to resistance would arise on behalf of those aggrieved: "[legislative power is] limited to the public good of the Society. It is a power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects."[240] Such a right was only to be exercised sparingly, however, following "a long train of abuses, prevarications and artifices."[241] As many secessionist scholars have noted, Locke's theory of revolution was designed for situations where governments perpetrate injustices against the entire population of a state, rather

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236. HUGO GROTIUS, DE JURE BELLIS AC PACIS LIBRI TRES: CHAPTER FOUR § 7(4) (F. Kelsey Trans., 1964) (1625); PETER P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL 213–20 (1960); BUCHHEIT, *supra* note 121, at 53.

237. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLE OF NATURAL LAW, bk. 1, ch. 4 § 54 (C. Fenwick Trans., 1916); BUCHHEIT, *supra* note 121, at 53.

238. BUCHHEIT, *supra* note 121, at 53; DE VATTEL, *supra* note 237, at ch. 17 § 200.

239. BUCHHEIT, *supra* note 121, at 53; REMEC, *supra* note 236, at 173–78; DE VATTEL, *supra* note 237, at ch. 2 § 16.

240. LOCKE, *supra* note 24, ch. XI § 135.

241. *Id.* ch. XIX § 225.

than a discrete segment. Presumably though, where a sub-state group experiences ongoing tyrannical rule, one of the primary mechanisms of resistance would be UNC secession.[242]

Following on from the works of Grotius, Locke, and Vattel, Thomas Jefferson also impliedly supported a remedial right to UNC secession. The Declaration of Independence, written by Jefferson, provided that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government . . . ."[243] Jefferson did not advocate precipitous change, however: "Government long established should not be changed for light and transient causes."[244] When though, a group experiences "a long train of abuses and usurpations,"[245] such as unremitting state-orchestrated oppression and discrimination, the group concerned is entitled to "throw off such Government"[246] and unilaterally secede.

The nineteenth century political philosopher, Henry Sedgwick, also argued in favor of a remedial right to UNC secession. In order for such a right to be activated, there must be "some serious oppression or misgovernment of the seceders by the rest of the community—i.e., some unjust sacrifice or grossly incompetent management of their interests, or some persistent and harsh opposition to their legitimate desires."[247] Sedgwick also argued that a right to UNC secession must be predicated on something more than mere "sentiments of nationality."[248]

Many modern philosophers support a remedial right to UNC secession for oppressed sub-state groups. The most prominent is Allen Buchanan, who argues that a sub-state group has a right to UNC secession if either of the following conditions is satisfied:

> 1. The physical survival of its members are threatened by actions of the state (as with the policy of the Iraqi government towards the Kurds in Iraq) or it suffers violations of other basic human rights (as with the East Pakistanis who seceded to create Bangladesh in 1970), or
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> 2. Its previously sovereign territory was unjustly taken by the state (as with the Baltic Republics).[249]

More recently, Buchanan has added a third condition justifying UNC secession, namely, "[t]he state's persistence in violations of

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242. BUCHHEIT, *supra* note 121, at 54–55.
243. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
244. *Id.*
245. *Id.*
246. *Id.*
247. HENRY SEDGWICK, THE ELEMENTS OF POLITICS 226 (2nd ed., 1897).
248. *Id.*
249. Buchanan, *Theories of Secession*, *supra* note 235, at 37.

intrastate autonomy agreements."[250] Once any of these three conditions has been satisfied, further sub-conditions must also be fulfilled. Foremost among these is that the group seeking UNC secession must guarantee the human rights of all its citizens.[251] Thus, newly created minorities must not be subject to the kind of discrimination and oppression formerly experienced by the newly seceded population. Further, Buchanan requires that the newly created state must amicably pursue the negotiation of new boundaries, fairly renegotiate treaty obligations, and cooperate with the existing state to account for an equitable sharing of national debt.[252]

Similar criteria have been postulated by Anthony Birch, who argues that UNC secession should only be allowed when one of the following preconditions has been satisfied:

> 1. The seceding region was included in the state by force and its people have displayed a continuing refusal to give full consent to the union;
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> 2. The national government has failed in a serious way to protect the basic rights and security of the citizens of the region;
>
> 3. The democratic system has failed to safeguard the legitimate political and economic interests of the region, either because the representative process is biased against the region or because the executive authorities contrive to ignore the results of that process; or
>
> 4. The national government has ignored or rejected an explicit or implicit bargain between sections that was entered into as a way of preserving the essential interests of a section that might find itself outvoted by a national majority.[253]

Thus, Birch does not endorse UNC secession purely on the grounds of parochialism. Something more is required, namely, the rectification of state-sponsored injustices.

Possibly one of the most conservative remedial-rights-only theories is that espoused by Per Bauhn. Like other remedial theorists, Bauhn postulates that oppressed national minorities are *prima facie* candidates for UNC secession. This right will only become exercisable, however, once all available domestic remedies have been thoroughly exhausted. Bauhn stresses that sustained and systematic state-sponsored oppression does not, *ipso facto*, enliven an immediate right to withdraw. Rather, those subject to oppression must remain within the existing state and attempt to change the government. As a result of experiencing general oppression, Bauhn postulates that an

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250. BUCHANAN, JUSTICE, *supra* note 232, at 351–52.

251. Buchanan, *Theories of Secession*, *supra note* 235, at 37.

252. *Id.*

253. Anthony H. Birch, *Another Liberal Theory of Secession*, 32 POL. STUD. 596, 599–600 (1984).

aggrieved group need not remain fully loyal to the existing state, and may validly refuse to pay taxes and resist detrimental government policies. In effect, Bauhn advocates a partial usurpation of the existing state's sovereignty. If the existing state responds to this partial usurpation by

> increasing repression, so that state officials either refuse to protect the basic rights of the members of the minority culture (to life freedom, physical and mental integrity), or actively violate these rights, then secession is morally justified, since the state no longer performs those protective functions which justify the loyalty and obedience of its citizens in the first place.[254]

Bauhn thus requires oppressed national minorities to act with a reasonable level of resistance against the existing state's authority before withdrawal can be initiated. Such resistance necessitates illegal behavior (from the perspective of the existing state) and thus exposes the oppressed minority to further punitive measures from the state apparatus. Whether this is an entirely desirable path to UNC secession—which perhaps ought to be sanctioned at an earlier stage once ongoing and systematic oppression has been identified—is certainly debatable.

The Friendly Relations Declaration and Fiftieth Anniversary Declaration provide a right to UNC secession which, philosophically, sits close to the ideas of scholars such as Buchanan and Bauhn. The right to UNC secession that can be deduced from those instruments is one of last resort and, by necessity, would require that the secessionist group endure at least some quantum of deliberate, sustained, and systematic human rights abuses.[255] Only after this has occurred, would a right to UNC secession arise as an *ultimum remedium*. The requirement that the group seeking UNC secession "endure" human rights abuses is driven by the state-centric nature of the Westphalian system. Only once human rights abuses have transcended a certain threshold of moral opprobrium will a right to UNC secession become available under the law of self-determination.

An important and often overlooked question within legal parlances is whether this is a philosophically acceptable outcome? In other words, does the present state of international law *vis-à-vis* UNC secessionist self-determination rest upon acceptable philosophical foundations?

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254. PER BAUHN, NATIONALISM AND MORALITY 111 (1995).

255. Anderson, *supra* note 81, at 358–59, 371–72, 378; Anderson, *supra* note 164, at 12–13.

B. *Normative Critique*

It is apparent that requiring a sub-state group to experience deliberate, sustained, and systematic human rights abuses is open to normative critique. This approach ensures that the stability of existing states is given undue preference over the human beings who reside within those states. The problem is compounded by the fact that self-determination is, as identified earlier, a bottom-up concept endowed with a progressive historical trajectory. Indeed, as the Glorious, American, and French Revolutions reveal, self-determination is opposed to the divine right of kings and the unquestioning allegiance to the existing sovereign. What then are the philosophical alternatives? The obvious starting point is primary right theories that encompass remedial and non-remedial UNC secession.[256] These theories are broadly underpinned by a belief in liberal values, particularly freedom of association[257] and the Millsian "no harm"[258] principle.

The antecedents of a liberal right to UNC secession can perhaps be traced to the seventeenth century German political philosopher, Johannes Althusius, who postulated that the state was composed of an aggregation of smaller communities, rather than a sovereign monolith.[259] Althusius theorized that society could be broken into five strata, namely, the family, corporation, local community, province, and state. Smaller units, such as the family, allowed the formation of larger units, such as the corporation and local community. These larger units in turn allowed the formation of provinces and, ultimately, states. Crucially, each unit only acquired the right to regulate activities necessary to its purposes. Furthermore, when smaller units formed larger units, they retained certain inherent rights. In the case of provinces, for example, Althusius held that a right to UNC secession from the existing state was preserved should the province desire withdrawal.[260] Similarly, local communities would be entitled to withdraw from provinces should the latter become corrupt or merely undesirable.[261]

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256. BUCHANAN, JUSTICE, *supra* note 232, at 353.

257. LUDWIG VON MISES, NATION, STATE AND ECONOMY 27 (Bettina B. Greaves ed., 1983) (stating that "no people, and no part of a people, shall be held against its will in a political association that it does not want").

258. JOHN STUART MILL, ON LIBERTY 83 (David Bromwich & George Kateb eds., 2003).

259. Donald Livingston, *The Very Idea of Secession*, 35 SOC'Y 38, 38–39 (1998); Kreptul, *supra* note 30, at 41–42.

260. Thomas O. Hueglin, *Review of Politica by Johannes Althusius*, 17 PUBLIUS 150, 152 (1997); BUCHHEIT, *supra* note 121, at 50 (citing O. GIERKE, THE DEVELOPMENT OF POLITICAL THEORY 46–47 (B. Freyd trans., 1939)); Kreptul, *supra* note 30, at 43.

261. BUCHHEIT, *supra* note 121, at 50

Alexis de Tocqueville, a scholar of American democracy, also argued in favor of a liberal right to UNC secession:

> [The Union] was formed by the voluntary agreement of the states; and these, in uniting together, have not forfeited their nationality, nor have they been reduced the condition of one and the same people. If one of the states chose to withdraw its name from the contract, it would be difficult to disprove its right to do so.[262]

De Tocqueville thus reasoned that if smaller political units can voluntarily come together to form a larger political unit, then the inverse, or UNC secession, must also be possible.

Modern philosophers have also endorsed a liberal right to UNC secession. These approaches are predicated upon the use of a plebiscite (or referendum) in order to ascertain whether the group seeking UNC secession has the requisite popular support.[263] If the plebiscite indicates in the affirmative, then a right to UNC secession arises, irrespective of the position adopted by the existing state. Generally, modern philosophers who support a liberal right to UNC secession can be divided into two groups: first, those who argue that UNC secession should be permissible if the group seeking to withdraw possesses certain ascriptive qualities (ascriptive philosophers); and second, those who advocate for a more unlimited right to UNC secession based upon association (associative philosophers).

Ascriptive philosophers assert that certain non-political features, such as those traditionally associated with the definition of a nation—language, history, and culture—provide a justification for UNC secession. The argument goes that a particular national/cultural unit, by satisfying certain ascriptive criteria, has the inherent right to pursue UNC secession. An example of this approach is provided by Avishai Margalit and Joseph Raz, who argue that such a right should be attributed to "encompassing groups," which, when dissected, equates with cultural groups.[264]

Associative philosophers, on the other hand, do away with the need for such ascriptive characteristics. A classic example is provided by the twentieth century liberal philosopher, Ludwig von Mises, who has argued that a right to UNC secession is inherent to citizens and arises irrespective of the existing state's consent:

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262. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 356 (Barnes and Noble Publishing, 2003) (1865).

263. Matt Qvortrup, *Voting on Independence and National Issues: A Historical and Comparative Study of Referendums on Self-Determination and Secession*, XX-2 REVUE FRANÇAISE DE CIVILISATION BRITANNIQUE (2015), http://rfcb.revues.org/366 [https://perma.cc/S7H3-S36E] (archived Sept. 15, 2016).

264. Avishai Margalit and Joseph Raz, *National Self-Determination*, 87 J. PHIL. 449, 443–48 (1990).

> A nation . . . daily confirms its existence by manifesting its will to political cooperation within the same state; a daily repeated plebiscite, as it were. A nation, therefore, has no right to say to a province: You belong to me, I want to take you . . . . It is important to realize how this interpretation of the right of self-determination differs from the principle of nationality. The right of self-determination . . . is not a right of linguistic groups but of individual men. It is derived from the rights of man. Man belongs neither to his language nor his race; he belongs to himself.[265]

More recently, Harry Beran has postulated that a sub-state group should have a right to UNC secession if "(1) it constitutes a substantial majority in its portion of the state, wishes to secede, and (2) will be able to marshal the portion of the resources necessary for a viable independent state."[266] In addition to these requirements, Beran stipulates the further condition that UNC secession should only occur if it is "morally and practically possible."[267]

Another prominent associative philosophy has been rendered by Christopher Wellman, who has postulated that a sub-state group should be entitled to UNC secession if (1) it constitutes a majority in its portion of the existing state, (2) the secessionist state will be able to carry out the legitimate functions of a state, particularly security for citizens, and (3) the existing state will not be rendered unable to carry out the legitimate functions of a state, particularly security for its citizens.[268]

A further associative philosophy of UNC secession has been postulated by Robert McGee. His philosophy is premised on the inherent right of individuals to freely associate, which inversely necessitates that individuals should not be compelled to remain within associations against their will. This opens up an unfettered liberal justification for UNC secession: "if a group does not want to be governed by its present government it should be able to secede and form a new government or merge with another existing government regardless of whether the present government approves."[269] McGee

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265. LUDWIG VON MISES, OMNIPOTENT GOVERNMENT: THE RISE OF THE TOTAL STATE AND TOTAL WAR 90 (1969); *See also* LUDWIG VON MISES, LIBERALISM, 78–83 (Bettina B. Greaves ed., 2005).

266. HARRY BERAN, THE CONSENT THEORY OF POLITICAL OBLIGATION 42 (1987). For an earlier philosophical articulation see Harry Beran, *A Liberal Theory of Secession*, 32 POL. STUD. 21, 21–31 (1984) [hereinafter Beran, *A Liberal Theory of Secession*].

267. Beran, *A Liberal Theory of Secession*, *supra* note 266, at 30.

268. Christopher Wellman, *A Defense of Secession and Self-Determination*, 24 PHIL. & PUB. AFF. 142, 161 (1995).

269. Robert W. McGee, *The Theory of Secession and Emerging Democracies*, 28 STAN. J. INT'L L. 450, 463 (1991) [hereinafter McGee, *Emerging Democracies*]; *see also* Robert W. McGee, *Secession Reconsidered*, 11 J. LIBERTARIAN STUD. 23 (1994) [hereinafter McGee, *Secession Reconsidered*]; Robert W. McGee, *A Third Liberal Theory of Secession*, 14 LIVERPOOL L. REV. 45, 45–66 (1992); Robert W. McGee & Danny Lam, *Hong*

argues that Monaco, the Vatican City, Lichtenstein, and Hong Kong demonstrate that geographical and population size limits are irrelevant.[270] Drawing upon the influence of Murray Rothbard,[271] McGee goes so far as to advocate a right of individuals to UNC secession: "[o]nce the right to secede is admitted, there is no logical stopping point. If a defined group such as a canton, district or village has the right to secede, so do individuals within those political units. Neither groups nor individuals should have a government forced upon them."[272]

Angelo Corlett, initially writing with the injustices perpetrated against indigenous Americans in mind,[273] has also argued in favor of an associative right to UNC secession if (1) the secessionist group is under the authority of a state from which a significant and informed majority wishes to depart, (2) the group has a valid moral claim to certain territory within the existing state, and (3) the group is willing and capable of absorbing in full the financial costs (if any) of withdrawing from the existing state.[274]

The foregoing approaches to UNC secession are radically different from current international law. Moreover, numerous historical examples that militate against a liberal philosophical approach to UNC secession can be easily marshalled: Katanga, Biafra, Chechnya, South Ossetia, Abkhazia, and Transnistria, to name but a few.[275] In the immediate term, therefore, a liberal approach to UNC secession—

Kong's Option to Secede, 33 HARV. INT'L L. J. 427, 427–40 (1992). For an absolute negative right of association, see Robert W. McGee, *The Right to Not Associate: The Case for an Absolute Freedom of Negative Association*, 23 UWLA L. REV. 123, 123–48 (1992).

270. McGee, *Emerging Democracies*, *supra* note 269, at 456.

271. MURRAY N. ROTHBARD, ETHICS OF LIBERTY 181 (1982).

272. McGee, *Secession Reconsidered*, *supra* note 269, at 24. McGee has noted:

> A government that provides comprehensive services [such as welfare, education, pensions, health care etc] must be fairly large in order to spread the cost over a large population. The administrative unit could be much smaller if those wishing to secede do not want to carry the burden of a large administrative state. If they are content with a minimal state that protects only life, liberty and property, the unit could be very small indeed.

See id. at 28; McGee, *Emerging Democracies*, *supra* note 269, at 458 (intimating that administrative and practical difficulties may militate against the right of individuals to UNC secession).

273. Corlett's theory does not, however, seem to be absolutely limited to indigenous Americans. For this reason, it is classified as associative. Corlett's more recent work is generically couched, although it still pays particular attention to the historical injustices perpetrated against indigenous Americans. *See* J. ANGELO CORLETT, TERRORISM – A PHILOSOPHICAL ANALYSIS 86 (2003).

274. J. Angelo Corlett, *Secession and Native Americans*, 12 PEACE REV. 7, 8 (2000); CORLETT, *supra* note 273, at 86.

275. Anderson, *supra* note 164, at 75–87.

whether ascriptive or associative—appears utopian and highly unlikely.

There may, however, be some small signs that a liberal approach to UNC secession will gain momentum in the future. First, if long time historical trends are a reliable indicator, more states are adopting liberal democratic forms.[276] The process is far from universal, and it is far from linearly perfect,[277] yet the signs seem to be that humans, when they have the opportunity, prefer a liberal system of government.[278] If this is correct, then, in the longer term, it would prognosticate better than might be intuitively assumed for a liberal approach to UNC secession in international law.

Second, there are some limited indications that a liberal approach to UNC secession is already being implemented by certain existing states—not surprisingly, those that are politically liberal. In the main, these states are ensuring that what would otherwise amount to UNC secession is always politically converted into consensual secession—either constitutionally or politically negotiated. An example is arguably afforded by Quebec and Canada. Quebec's consistent interest in secession has been an established aspect of Quebecer and Canadian political discourse for over three decades, culminating in two unsuccessful independence referendums in 1980 and 1995.[279] In light of an announcement in 1996 by the Parti Québécois leader Lucien Bouchard that a third referendum would be conducted in the future, the Canadian Prime Minister, Jean Chrétien, initiated a reference probing the legal consequences and implications of Quebec's potential unilateral or constitutional secession. In *Reference re Secession of Quebec*[280] the Canadian Supreme Court ruled out the possibility for Quebec's UNC secession under international law.[281] If Quebec were to secede, it was decided that it would have to be achieved constitutionally, which would require Quebec and Canada to negotiate

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276. Harald Borgebund, *Review Article: Modus Vivendi Versus Public Reason and Liberal Equality: Three Approaches to Liberal Democracy*, 18 CRITICAL REV. INT'L SOC. & POL. PHIL. 564, 564–75 (2015); Thomas A. Spragens Jr., *Liberal Democracy*, *in* THE ENCYCLOPEDIA OF POLITICAL THOUGHT, 2125–29 (2014); *see* Larry Diamond, *Facing Up to the Democratic Recession* 26 J. DEMOCRACY 141, 143 (2015) (reporting that the number of liberal democracies has doubled between 1974 and 2013).

277. Wolfgang Merkel, *Are Dictatorships Returning? Revisiting the 'Democratic Rollback' Hypothesis*, 16 CONTEMP. POL. 17, 17–31 (2010).

278. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); Francis Fukuyama, *The End of History*, 16 THE NAT'L INT. 3, 4 (1989). Fukuyama has gone even further, suggesting that liberal democracy represents the evolutionary end point of human political systems.

279. François Rocher, *Self-Determination and the Use of Referendums: The Case of Quebec*, 27 INT'L J. POL., CULTURE, & SOC'Y 25, 25–45 (2014).

280. *Reference re Secession of Quebec*, 1998 2 S.C.R. 217 (Can.).

281. *Id.* ¶¶ 111, 138–39, 154 (per Lamer CJ, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, & Binnie, JJ.).

in good faith.[282] The prospect of Canada refusing to accede to Quebec's withdrawal was not considered a realistic or lawful possibility by the Supreme Court.[283] This was despite the fact that the impetus for such constitutional negotiations would be a *unilaterally* exercised vote by Quebec citizens in favor of independence.[284] Other Canadian citizens would be excluded from the referendum process. Only after Quebec citizens *unilaterally* declared a desire for secession would a constitutionally negotiated process have to occur.[285]

The principles espoused in *Reference re Secession of Quebec*[286] are clearly outside the current remedial right to UNC secession in international customary law, which is only enlivened by deliberate, sustained, and systematic human rights abuses *in extremis*. The result was arguably an instance of the Canadian Supreme Court framing what would otherwise be a unilateral process as a consensual and constitutional one. These efforts were buttressed by the subsequent passage of the *Clarity Act 2000*, which reaffirmed the Supreme Court's constitutionally centric dicta.[287] From a certain perspective then, events in Canada and Quebec indicate obfuscated support for a more liberal approach to UNC secession that may, provided sufficient time, eventually percolate into the international law of self-determination.

A more recent example of liberal tendencies is afforded by the attempt at Scottish independence on September 18, 2014.[288] A

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282. *Id.* ¶¶ 88–97, 104, 149–52.

283. This stemmed from the Canadian Supreme Court's underlying commitment to liberal principles: "[t]he other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others." *Id.* ¶ 151.

284. The desire for UNC secession in Quebec is thought by many commentators likely to continue. *See* Lawrence Anderson, *Both Too Much and Too Little: Sources of Federal Instability in Canada*, 44 AM. REV. CAN. STUD. 15, 21 (2014); Emmanuelle Richez & Marc André Bodet, *Fear and Disappointment: Explaining the Persistence of Support for Quebec Secession*, 22 J. ELECTIONS, PUB. OPINION & PARTIES 77, 77–93 (2012); Lawrence Anderson, *Federalism and Secessionism: Institutional Influences on Nationalist Politics in Québec*, 13 NATIONALISM & ETHNIC POL. 187, 187–211 (2007).

285. The emphasis on constitutional negotiations is also designed to make allowance for the Aboriginal peoples of Quebec, who have consistently expressed their desire to remain part of Canada—not Quebec. The fact that these views should be taken into account, however, provides further evidence of *liberal* values underpinning any future secession of Quebec.

286. *Reference re Secession of Quebec*, 1998 2 S.C.R. 217 (Can.).

287. Clarity Act, S.C. 2000, c 26, art 1, 2, 3 (Can.).

288. *See generally*, Thomas Patrick, *The Zeitgeist of Secession Amidst the March Towards Unification: Scotland, Catalonia, and the Future of the European Union*, 39 B.C. INT'L & COMP. L. REV. 195, 200–02 (2016); Natalija Shikova *Practicing Internal Self-Determination Vis-a-Vis Vital Quests for Secession*, 17 GERMAN L. J. 237, 251–53 (2016); Timothy William Waters, *For Freedom Alone: Secession After the Scottish Referendum*, 44 NATIONALITIES PAPERS 124, 124–43 (2016); Nathalie Duclos, *The Strange Case of the Scottish Independence Referendum: Some Elements of Comparison between the Scottish*

fundamental precept of the Scottish independence referendum was that the United Kingdom (UK) and Scotland would negotiate in good faith, should a majority of Scottish citizens vote in favor of independence. Although ostensibly a politically negotiated secession, at a more substantive level, the impetus for Scottish independence was unilateral, namely, Scottish citizens and residents potentially voting in favor of independence from the UK. Other UK citizens and residents were excluded from the referendum process.[289] Despite this, the UK's commitment to respect the independence referendum—indeed even to hold a referendum in the first place—stemmed from liberal values and indicated obliquely that UNC secession should not be constrained to the remedying of deliberate, sustained, and systematic human rights abuses. As such, events surrounding the Scottish independence referendum may portend the nascent beginnings of a more liberal approach to UNC secession, which, over numerous decades, might slowly infiltrate the international law of self-determination.

Whether a liberal approach to UNC secession based upon ascription or association would be superior to the current remedial-rights-only approach is an important philosophical question. This is especially the case because the primary motivation of innumerable UNC secessionist disputes is the simple desire of a defined political group—ascriptive or associative—to withdraw from the existing state. Why should a sub-state group be held against their wishes within the existing state? Would this not be antithetical to certain underlying premises of self-determination?[290] Would it not be patently illiberal? If liberal democratic values are to be increasingly adopted over the coming century, would it not seem likely that the restrictively cast remedial-rights-only approach to UNC secession will be gradually supplemented by a new liberal international legal norm? Such a norm

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and Catalan Cases, XX-2 REVUE FRANÇAISE DE CIVILISATION BRITANNIQUE (2015), http://rfcb.revues.org/384 [https://perma.cc/P6Z2-K6JC] (archived Dec. 30, 2016); Benjamin Levites, *The Scottish Independence Referendum and the Principles of Democratic Secession*, 41 BROOK. J. INT'L L. 373, 373–405 (2015); Elisenda Casanas Adam, *Self-Determination and the Use of Referendums: The Case of Scotland*, 27 INT'L J. POL., CULTURE, & SOC'Y 47, 47–66 (2014); Paolo Dardanelli & James Mitchell, *An Independent Scotland? The Scottish National Party's Bid for Independence and its Prospects*, 49 INT'L SPECTATOR: ITALIAN J. INT'L AFF. 88, 88–105 (2014); Jonathan Hearn, *Nationalism and Normality: A Comment on the Scottish Independence Referendum*, 38 DIALECT. ANTHROPOL. 505, 505–12 (2014); Tom Mullen, *The Scottish Independence Referendum 2014*, 41 J.L. & SOC'Y 627, 631–34 (2014).

289. *Scottish independence: SNP dismisses ex-pat voting call*, BBC (Jan. 18, 2012), http://www.bbc.com/news/uk-scotland-scotland-politics-16607480 [https://perma.cc/KRW3-AS48] (archived Sept. 20, 2016).

290. Corlett has noted, "a secessionist collective need not consult for approval the state from which it is justifiably seeking to secede. For this condition not to obtain would make a mockery of the concept of secession insofar as it is an instance of self-determination." Corlett, *supra* note 274, at 9.

would not be entirely disconnected from the principal historical precursors to the present UN law of self-determination.

VII. CONCLUSION

History demonstrates that self-determination is associated with resistance to the divine right of kings, support for political revolution, and abolition of colonialism. In more recent times, particularly post-1970, self-determination has become gradually associated with a qualified right to UNC secession. Viewed through a broad lens, self-determination is a check on the unending preservation of the political status quo, emphasizing that political communities are inevitably inclined to progressive change. Usually this will be achieved organically from within the exiting state, but exceptionally it may occur externally through UNC secession. The legal development of self-determination from a mere principle in the UN Charter (*lex desiderata*), to an operative and substantive doctrine of modern international law (*lex lata*), mirrors this progressive trajectory.

The current law of self-determination as expressed in UN instruments provides a qualified right to UNC secession for peoples subjected to deliberate, sustained, and systematic human rights abuses by the existing state.[291] This emerges from a close reading of Principle 5 paragraph 7 of the Friendly Relations Declaration and Article 1 of the Fiftieth Anniversary Declaration. Subsequent UN instruments, such as the Indigenous Declaration, in no way detract from this position.

The qualified right to UNC secessionist self-determination articulated in UN instruments is coextensive with the remedial-rights-only philosophical approach. This means that more liberal philosophical approaches to UNC secession, which place emphasis on the unqualified right of sub-state groups to withdraw from the existing state, are not accommodated by current international law. It is important as normative thinkers to question the appropriateness of this restriction. In short, it is important to consider not only whether a more liberal approach to UNC secession is commensurate with self-determination, but also whether such an approach is likely to animate the future development of the law of UNC secession.

In considering such questions, it is incumbent not to elevate the principles of state sovereignty and territorial integrity to such

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291. As argued above, the textual articulation in the Friendly Relations Declaration and Fiftieth Anniversary Declaration does not specify the necessity of human rights abuses *in extremis*—this is a requirement that is deducible from state practice in terms of physical acts and omissions, especially acts of recognition in response to UNC secessionist disputes. *See* Anderson, *supra* note 81, at 372, 394–95; Anderson, *supra* note 96, at 232; Anderson, *supra* note 164, at 12.

stratospheric heights that they lose all connection with their basal purpose—providing a territorial political unit for the benefit of human beings. Rather than reflexively championing the absolute supremacy of Westphalian sovereignty, it is important to consider whether a change of political control over territory is necessarily a negative phenomenon. Is it possible that UNC secession might sometimes induce greater political and social cohesion? Will "world order" really be threatened if peoples who want to politically separate effect UNC secession? Would a more realistic approach to UNC secession be consonant with the historically verified ebb and flow of geopolitics?

The evolution of the law of self-determination will almost certainly bear upon UNC secession. Two developments appear ineluctable in the post-millennial era. *First*, the existing customary law right of oppressed peoples to UNC secession will be legally strengthened. This means that UNC secession is likely to become a possibility not just in response to human rights abuses *in extremis* (ethnic cleansing, mass killings, or genocide), but also *in moderato* (political, cultural, or racial discrimination). For this to occur, state practice in terms of physical acts and omissions, particularly grants of recognition in response to UNC secessionist disputes, will have to evolve. *Second*, in the much longer term, UNC secession will likely become less qualified and thus justified on more liberal philosophical bases. In other words, the need for human suffering will be abolished in favor of a democratic liberal principle that recognizes the rights of peoples to politically re-organize by way of UNC secession. These two advances, likely to take place sequentially and be mutually reinforcing, are important if the law of self-determination is to continue its historical demarche. It will ensure that the current tension between state sovereignty, territorial integrity, and self-determination is tilted towards the "peoples." Such progression will be necessary if UNC secessionist disputes are to be resolved peacefully, rather than by force of arms, in the twenty-first century and beyond.