NOTES

TOWARD SELF-DETERMINATION—A REAPPRAISAL AS REFLECTED IN THE DECLARATION ON FRIENDLY RELATIONS

Admittedly, the significance of the principle of self-determination continues to evoke question and sustain discord. The principle is seen by some as "the hope for the future of mankind," while, skeptics of the principle dispute its viability, and label its proponents as "politically naive." And though recent international declarations and covenants speak authoritatively of a right of self-determination, in the Indo-Pakistani conflict where application of such a right would have seemed most appropriate, it was neither respected nor even formally asserted. Every effort to utilize the principle of self-determination as a vehicle for preserving world order and basic human rights of all people is apparently overwhelmed by forces that see it as promoting anarchic nationalism and infringing upon the sovereign integrity of states.

Yet amidst this discourse, the United Nations General Assembly, in its 25th Anniversary Session, put forth a detailed declaration affirming this principle. The Declaration on Friendly Relations, called by the Chairman of the Sixth Committee "the greatest [document] since the Charter of the United Nations

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2Green, Self-Determination and Settlement of the Arab-Israeli Conflict, 1971 A.S.I.L. Proceedings 40. Mr. Green concludes his paper with the following remark: "It would appear that despite the fanfares of propaganda which have accompanied certain United Nations resolutions, there is present no legal right of self-determination." Id. at 48.


4See Nanda, Self-Determination in International Law: the Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan), 66 A.J.I.L. 321 (1972).

5For an account of some of these arguments see Mustafa, The Principle of Self-Determination in International Law, 5 Int'l Law. 479, 483-484 (1971).

itself," proclaimed seven principles of international law. One of these was "the principle of equal rights and self-determination of peoples." To what


These principles are:
(a) The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,
(b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered,
(c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter,
(d) The duty of States to co-operate with one another in accordance with the Charter,
(e) The principle of equal rights and self-determination of peoples,
(f) The principle of sovereign equality of States,
(g) The principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

Note 6 supra.

This principle is described in the Declaration as follows:

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

[2] Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
(a) To promote friendly relations and co-operation among States; and
(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

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

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

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

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

[6] The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

[7] Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
extent this Declaration resolves the dispute concerning the significance of the principle cannot be fully ascertained. However, an examination of the principle as expressed in the Declaration with its *travaux préparatoires*, and the principle as it has existed in international law, will provide an assessment of its present and continued viability.

I. THE DECLARATION

To define the principle of self-determination as the right of peoples to determine for themselves their own political status seems at first truistic and therefore unnecessary. But, a conflict exists as to where the legal impetus for self-determination resides. This conflict was evidenced by the various proposals put forth in the Special Committee established to draft the definition. The basic controversy was whether the definition should emphasize the principle as establishing a right of self-determination belonging to a people, or as establishing a duty owed by states generally to respect the self-determination of a people? The representatives of the United States and the United Kingdom urged that the first paragraph of the definition begin, "[e]very State has the duty to respect the principle," and make no mention of a right belonging to peoples. However, the joint proposal submitted by a group of non-aligned states and the proposal submitted by Czechoslovakia, Poland, Romania, and the U.S.S.R. countered with the proposition that "[a]ll peoples have the inalienable right to self-determination." By ultimately adopting the philosophy of the latter, embodied in the language "all peoples have the right freely to determine . . . their political status," the Special Committee established the principle as a right

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

Note 6 supra.


[4] Id. at 50.

[5] Id. at 51.

[6] Id. at 52. Those States were Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia.

[7] Id. at 53.

that can be executed by peoples themselves. It is, therefore, not merely a privilege dependent on a state's good faith in fulfilling its duty to respect this principle.

This is not to say that such a duty does not exist. Ironically, the right of self-determination, as defined in the Declaration, is legally and pragmatically dependent on this duty. "Every State has the duty to promote . . . the self-determination of peoples . . . and to render assistance to the United Nations in carrying out" the implementation of the principle. Yet, no right is granted directly to a people to call on the United Nations to enforce these responsibilities. Instead, the Declaration is directed toward promoting friendly relations and co-operation among states and was approved by the United Nations, an organization made up of states; therefore, the legal effect of the Declaration is directed toward states. Hence, the omission of a statement of the enforceability of the right of peoples to self-determination should not prejudice the legal competence of that right.

While the legal competence of the right probably was not impaired by the manner in which the Special Committee chose to set out the legal effect of the principle, the Declaration seems to limit unduly the universality of the principle. In stating what constitutes a violation of the principle, the drafters were obviously concerned with censuring colonial misbehavior. This concern may have subtracted from the universal nature of the principle espoused in the introductory paragraph's "all peoples" terminology. Proclaiming in the second paragraph that it is alien subjugation, domination, and exploitation that constitutes a violation of the principle, the Declaration offers no solace to those peoples subjected to domestic mistreatment. This apparent weakness is partially alleviated in subsequent paragraphs. The third paragraph asserts a duty (albeit in indefinite language) to promote universal respect for human rights and fundamental freedoms. Although the wording is vague, the duty certainly

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7Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 2.

8Even as to states the legal significance of a violation, being only "contrary to the Charter," apparently is not an absolute proscription. Compared with the legal effect of the first principle of the Declaration, a transgression of which "constitutes a violation of international law and the Charter of the United Nations," it is arguable that the Special Committee intended the legal effect of an infringement of the principle of self-determination to be something less than a violation of international law.

9The use of such broad language has been attacked on grounds that it "verges on being meaningless, or, alternatively, in the highly unlikely event of its being taken at all seriously, it is a declaration of an extreme libertarian or even anarchistic variety . . . ." Emerson, Self-Determination, 1966 A.S.I.L. PROCEEDINGS 135, 136.

10However, one of the drafters of the Declaration has pointed out that "alien" slipped into the text only because it was part of the same phrase that had been incorporated in earlier declarations. Arangio-Ruiz, Codification of the Principles of International Law on Friendly Relations, supra note 1.

It could also be argued that "alien subjugation" refers only to subjugation by an alien people not necessarily a foreign state. If so, the universality of the principle is not diminished.
extends the scope of the principle beyond colonial areas. Also, language in the seventh paragraph declares that “States conducting themselves in compliance with the principle” are “thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.” Then a state subjugating, exploiting, or discriminating against persons because of their ethnic origin, would be in clear violation of the principle.

However, a more important question concerns the principle’s implementation. Here, the Special Committee has provided an extremely adaptable vehicle. Most notably, the implementing provision\(^\text{21}\) is couched in terms of self-implementation. Thus, there is no legal dependence upon the administering state’s duty to implement the principle in good faith by “maintain[ing] a readiness to accord self-government.”\(^\text{22}\) Moreover, the policy toward implementation has significantly shifted from the idea expressed in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.\(^\text{23}\)

An equally important aspect is that the methods of implementing self-determination are adaptable to any situation which might arise. Since World War II the most common mode of implementation has been “[t]he establishment of a sovereign and independent State,”\(^\text{24}\) which is manifested by the emergence of the many newly independent states from former colonial territories and most recently by the emergence of Bangladesh. “[T]he free association or integration with an independent State”\(^\text{25}\) has also been a common mode of implementation practiced, for example, by the United States in the formation of each of its last thirty-seven states.\(^\text{26}\) The third mode of implementation, “the emergence into any other political status freely determined by a people,”\(^\text{27}\) may provide the most interesting and innovative use of the principle of self-determination. The creation of an internationally protected semi-autonomous

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\(^{21}\)Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 4.

\(^{22}\)Report of the Special Committee (1969), at 52. The drafting committee included this proposal, submitted by the United Kingdom, as an alternative method of implementation—at least for purposes of discussion. It was omitted altogether in the adopted draft. Id. at 65.


> Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories. . . .

\(^{24}\)Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 4.

\(^{25}\)Id.

\(^{26}\)In fact, the wording in this part of the implementing paragraph is similar to that proposed by the United States. Report of the Special Committee (1969), at 50. Commenting on this paragraph, the United States representative to the Special Committee pointed out that “the word ‘independence’ as thus used in the preamble and in the fifth paragraph implied no legal or constitutional preference for the culmination of self-determination in the form of independent and sovereign statehood.” Report of the Special Committee (1970), at 122.

\(^{27}\)Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 4.
government within a state may be an acceptable and effective answer to conflicts existing where a people demand refuge from those who are governing them, and where the economic viability of the entire state depends upon the cohesion of its people and territory. Similarly, a distinct but not independent political status for peoples in pluralistic societies with no geographical identity could offer remedies for some of the world's most troubled areas.

In a declaration purporting to promote friendly relations and co-operation among states a difficult, but unavoidable, problem concerns the use of force. This problem is reflected first in the Declaration's vague limitation on the use of force to defeat self-determination rights:28 "Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence."29 The uncertainty of defining the limits of this duty is most evident in the travaux préparatoires. The United Kingdom took the position that whatever the effect of this sentence it clearly "could not be understood as precluding such limited police action as might be essential to maintain or restore law and order."30 Yet, several representatives maintained that a force used to keep law and order was tantamount to a force used to perpetuate colonialism31 and was therefore precluded. The drafting committee rejected the more explicit language, "States are prohibited from undertaking any armed action or repressive measures against peoples under colonial rule," proposed by the anticolonial states.32 From this action it may be assumed a more lenient construction was intended. The mere acknowledgement of the existence of this duty, however, is significant in light of the fact that only two of the six proposals33 even mentioned such a duty.

Equally ill-defined is the Special Committee's treatment of the use of force by peoples rather than states in the defense of the right of self-determination. The omission of the right to self-defense only compounds the problem. Several of the submitted proposals specified that peoples were entitled to exercise "their right of self-defense,"34 or in stronger terms "the right to carry on the struggle, by whatever means, including armed struggle, for their liberation from colonialism."35 However, mention of such a right of self-defense was omitted from

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28Obviously, the reason for this vagueness is the tense nature of the subject at issue. As noted by the representative from the United States, this paragraph came out of the most intensive negotiations. Report of the Special Committee (1970), at 123.
29Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 5.
30Report of the Special Committee (1970), at 114. It was contended by the representatives of this view that apart from the extreme Chapter VII situations, the Charter did not regulate the use of force in colonial situations since these were not "international relations." Report of the Special Committee (1969), at 59. However, this contention merely circumvents the issue since the Declaration is intended to interpret what the Charter does in fact regulate.
32Czechoslovakia, Poland, Romania, and U.S.S.R. Id. at 54.
33Id. at 49, 54.
34Id. at 52.
35Czechoslovakia. Id. at 49.
the Declaration. It may be argued that this right was included by implication because the final draft recognizes that peoples will resist by “actions against . . . such forcible action” in pursuing their right to self-determination. Such resistance would of necessity be forcible actions. Furthermore, some contended that this right derives from the self-determination principle, because “where there is a right there is a remedy.” However, others argued that no such right exists under the Charter for several reasons: “peoples” do not possess the same rights as “States”; the right of self-defense cannot be used to justify the overthrow of colonialism because the legitimacy of colonial rule is recognized under the Charter; article 2(4) of the Charter is limited to “international relations,” hence, not to colonial situations; and, finally, “no system of law [can] establish a legal right of revolution.”

The controversy over the existence of the right of self-defense was heightened by the Declaration’s inclusion of the authority to “seek and to receive” support in the struggle to enforce the right of self-determination. The delegate from South Africa contended that such authority renders the whole idea of self-determination nugatory by giving every state discriminatory powers to take action against another state on the pretext that the government of that state is not representative of the whole people. The United States representative made it clear that this “did not constitute a general license for international traffic in arms.” Due to the wide range of possible interpretations, the exact effect of this authorization on those asserting the right to self-determination is unknown. For the present it is sufficient to say that recognition of the right to defend the principle of self-determination marks an important step toward the acceptance of the right of self-determination.

The Special Committee took a restrained position in applying the self-determination right to dependent territories. The statement in the first paragraph, that one of the goals of the United Nations in implementing the principle is “to bring a speedy end to colonialism,” as compared to some of the proposals that were made, illustrates an almost complacent attitude toward colonialism. One proposal stated the purpose was “to bring about an immediate end to colonialism and to transfer all power to the people.” Another urged that colonialism in all “forms and manifestations shall be liquidated completely and without delay.” Similarly, in the sixth paragraph, which is devoted to
fixing the status of non-self-governing territories as "separate and distinct from the territory of the State administering it," the language employed was evidently toned down from that used in earlier declarations. It has been suggested that this attitude by the Committee is based on the fact that few areas of traditional colonialism still exist. The Special Committee chose to downplay the application of the principle in the colonial context in an attempt to circumscribe its use as a rhetorical tool for decolonization and to move toward a more universal application of the principle.

In its two final paragraphs the Declaration makes a definite contribution to the development of the principle in formulating needed bounds to protect it against abuse by irresponsible separatist movements. But these limitations do not preclude the principle's application inside the political boundaries of all sovereign and independent states. Essentially, the principle, as stated, is not to be construed so as to sanction any action which would infringe upon "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 . . . ." Thus, if a state were violating a duty owed under this principle, for example the duty to promote "respect for and observance of human rights and fundamental freedoms," peoples within that state would not be barred from implementing this principle. And although the state must be "possessed of a government representing the whole people," the Special Committee rejected those proposals which urged that a sovereign state possessing a representative government and functioning as such to all distinct groups within its territory was to be "presumed" or "considered" to be

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"Thus, United Nations jurisdiction is not precluded by article 2 (7) of the Charter, which states: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ."

"For example, the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960), states: Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

"In fact, in some areas such as Puerto Rico and the Falkland Islands, where what is arguably traditional colonialism still remains, an unrestrained right of self-determination would be of little consequence. In these areas it is doubtful that the people would use the right to terminate the existing beneficial relationships.

"Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 7. This qualification marks a significant departure from the treatment of this subject in the 1960 Declaration on Decolonization, which stated unequivocally that any attempt at the disruption of the national unity and territorial integrity of a country was incompatible with the Charter. G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

"Declaration on Friendly Relations, on the principle of equal rights and self-determination, paragraph 3.

*Id., para. 7.


*United Kingdom. Id. at 52.
satisfying this principle. In order to apply this circuitous limitation, one must further investigate the reasoning behind it. If a state is not complying with the principle, the limiting clause does not apply and its peoples are free to determine their own political status. If a state is complying with the principle, its peoples would be free to determine their own political status without the leverage of the Declaration. It is important to remember that this Declaration is directed toward states and offers guidelines to states only, not to peoples. Such a limitation in effect promises to protect the territorial integrity and political unity of those states acting in compliance with the principle. It does not purport to set out any criteria to aid in determining whether a particular group of people are among such “peoples” who under the principle are entitled to employ a particular mode of implementing the right of self-determination. Establishing these criteria must be the next and most essential step in the development of the principle.

Thus, in an analysis of the United Nations most recent enunciation of the principle of self-determination, certain conclusions are compelling. First, the right of self-determination is indeed a right. It is not a mere privilege dependent solely upon a state's duty of good faith to grant self-determination to its peoples. Second, though there is a definite concern for the plight of colonized peoples, the right belongs to all peoples. The Declaration makes certain that the right is one of broad relevance and one that must outlast its ephemeral function in the dismantlement of colonialism. Third, in implementing the principle a people are free to determine the political status that best suits their circumstantial demands. Whether it be an independent state, association with an independent state, or any other political status, according to this Declaration, it is to be determined by the people affected. Fourth, the right to defend this principle, while not well defined, does exist. At least to the extent that force is employed to deprive them of their right of self-determination, a people may resist such force and are entitled to seek support in this resistance. And finally, the principle does not sanction any action which would impair the territorial integrity or political unity of an independent state, if that state is complying with the principle.

The value of these conclusions in international law is dependent on the value of the Declaration which enunciates them. Hence, an appraisal of the principle cannot end here. In order to make a realistic evaluation of the right of self-determination, examination must go beyond the unqualified definition of that right. In order to accurately determine the value of the right as it now exists, this definition must be properly placed in the legal perspective of a General Assembly declaration and viewed in relation to manifestations of the right in customary international law.

II. THE LEGAL SIGNIFICANCE OF THE DECLARATION

Assessing the legal significance of the Declaration, the Delegate from Portugal noted that it did not constitute a source of law, since it was merely con-
tained in a General Assembly Resolution and therefore was only a recommendation. While technically accurate, such a view is at least superficial. For although the General Assembly does not have express authority to create laws, the limitations imposed by the term "recommendation" in Chapter IV of the Charter are by no means certain, and the legal significance of a Declaratory Resolution is not to be confined by them. The legal value of a declaration lies in the extent that it authoritatively proves the existence and determines the character of a legal rule. In its formulation of the Declaration on Friendly Relations, the Assembly interpreted and applied the Charter provisions concerning the principle of equal rights and self-determination. This process of interpretation and application should be distinguished from the recommendatory functions of the Assembly. Since such recommendations are often accompanied by assertions of legal rights and obligations under the Charter it is evident that these assertions are not merely recommendatory. Rather they are considered "as authoritative precepts derived from the Charter or accepted rules of international law." The extent to which these assertions are probative of the legal rules they declare can be determined only by a thorough analysis of the particular Declaration in question. Weighing four subjective factors—intention, consensus, legal foundation, and realistic acceptability—will facilitate this analysis.

The wording adopted by the Assembly evidences substantial intent to formulate legal rights and obligations in the principle grounded on equal rights and self-determination. The title, "Declaration on Principles of International Law . . . ," coupled with the sixteenth paragraph in the preamble—"convinced

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53 Under Chapter IV:

The General Assembly . . . may make recommendations with regard to [general principles of cooperation in the maintenance of international peace] to the Members or to the Security Council or to both. U.N. CHARTER art. II, para. 1.

55 See id.

56 The basic language adopted is derived from that used in the Charter. U.N. CHARTER art. 1, states:

Art. 1. The Purposes of the United Nations are:
1. . . .
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .

However, it should be emphasized that the principle enunciated in this Declaration does not rely solely on this provision (or the similar language in U.N. CHARTER art. 55) and is not, thereby, subject to any limitations embodied in this provision.

58 See O. ASAMOAH, supra note 54, at 68-75.
59 For a recent discussion of the legal significance of "general principles of law" as a source of international law, see Paul, General Principles of Law in International Law, 10 INDIAN J. INT'L L. 324 (1970).
that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law," provides strong argument for the presence of this intent. By continuous reference to the right of self-determination in the operative paragraphs, the drafters seem to recognize that a legal right does exist. That the Assembly requested Member States to select jurists as representatives to serve on the Special Committee suggests a desire that the Declaration have concrete legal significance.

The strongest argument for the authoritativeness of the legal right of self-determination as it is asserted in the Declaration is that the enactment and content were a product of consensus. This consensus allowed all delegations to express their understanding of the principle. Only those conclusions which were acceptable to a unanimous international community, represented in the Assembly, were adopted. Although the probative value of consensus is not to be denied, this process was ultimately a compromise. Only after subsequent compliance can it really be determined if a particular state has abandoned a previous policy inconsistent with the right expressed in this compromise.

Before the Declaration can profess a legal right there must be an authorization permitting such documents to carry this authority. Article 1(2) of the Charter states that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." The Charter also gives the General Assembly authority to recommend corrective measures for situations it deems likely to impair friendly relations among nations and to make recommendations promoting the progressive development of international law and its codification. Consequently, the Assembly acts under direct authority of the Charter when it recommends codification of measures likely to correct a situation which impairs friendly relations among nations. However, this syllogistic analysis will lose substance if it is shown that the Assembly's action was motivated more by political expediency than by legal hypothesis. Yet even conceding a presence of political motivation, the legal foundation of the Declaration should not be devalued. For, a contemporary enunciation of the principle of equal rights and self-determination necessarily requires political, as well as legal, considerations if it is to be of any practical value.

Whether the principle was interpreted and applied in a manner that can

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62In fact, the pressure to concede to this compromise was probably greater at this Anniversary Session in order to maintain the felicity of the occasion.
64U.N. Charter art. 13, para. 1(a).
65Some writers contend that Assembly resolutions have no legal value due to the predominance of political considerations in them. Cheng Bin, International Law in the United Nations, 8 Yearbook of World Affairs 174-78 (1954); Robinson, Revision of the Charter, The United Nations' Ten-Years of Legal Process 175-78 (1956).
realistically be complied with is the final important factor to be examined. In view of the centuries it took to build the colonial empires, their radical deterioration in relatively recent years shows the increasing strength of the right of self-determination. And after ten years of adherence (though perhaps reserved adherence) to the Declaration on the Granting of Independence to Colonial Countries and Peoples,66 it cannot be said that a declaration which reinforces these earlier provisions without radically departing from them is impracticable.

An examination of the individual comments of the Delegates, however, indicates that at least a substantial portion of the Assembly refused to deem it _jus cogens_.67 And the numerous criticisms68 made as to the imprecision, inconsistencies, omissions, and redundancies in the document illustrate something less than an unqualified approval. The universality of the terms in which this right was ultimately expressed may have caused some delegates to be apprehensive about being absolutely bound by it. Although they intended to recognize a legal right of self-determination, they possibly did not intend to recognize this right in every conceivable situation in which it might be invoked. And perhaps another reason for the reluctance of some of the Delegates to grant the Declaration _jus cogens_ status lies in the manner in which it was formulated. For, as the Declaration was passed by consensus, and thus by unanimous approval, its nature is necessarily one of intense compromise.69 It is understandable, therefore, that there are many who would prefer not to be committed to the Declaration until it can be seen exactly how much they have lost in the compromise. But while this consensus approach may draw reservations from some, the significance of its representative character and unanimous approval deserves emphasis and is of considerable weight in an assessment of the document's practicability. It should be concluded that the Declaration does formulate a realistically acceptable legal right of self-determination; but the breadth to which a state will acknowledge this right is at this point unclear.

III. SELF-DETERMINATION IN CUSTOMARY INTERNATIONAL LAW

In the United Nations Charter70 the principle of equal rights and self-
determination of peoples is affirmed twice—at articles 1(2) and 55. The precise legal significance of these provisions is uncertain but it is generally conceded that they were not intended to create a right to self-determination. During the twenty-five years between the enactment of the Charter and the date of the Declaration on Friendly Relations the composition of the United Nations and the international community has undergone changes that may have greatly affected the principle. The continuous procession of newly independent states into the United Nations has increasingly stimulated antipathy for colonialism within that body and has been instrumental in formulating many Assembly resolutions incorporating a right of self-determination.

As to what effect this change has had on the legality of the principle, there is a diversity of opinion. On one side it is argued that articles 1(2) and 55 create a principle only in the sense of a political "standard" and cannot be the basis for a right of self-determination. "[S]ubsequent practice as an element of interpretation does not support the proposition that the principle of self-determination is to be interpreted as a right." But, this overly semantic view

separate themselves from the State of which they form part by the simple expression of a wish, anymore than it recognizes the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State, which is definitively constituted.


See note 56 supra.

For the proposition that these principles have no binding effect, see H. Kelsen, THE LAW OF THE UNITED NATIONS 51-53 (1950). For the proposition that they now have legal validity, see Wright, Recognition and Self-Determination, 1954 A.S.I.L. PROCEEDINGS 23, 30.

This intent was grounded in the fact that the 1945 San Francisco Conference was seen by many participants as primarily concerned with international organization relative to governments. Concern for dependent peoples was at best secondary. Gilchrist, Colonial Questions at the San Francisco Conference, 39 AM. POL. SCI. REV. 982, 987 (1945); see Emerson, Colonialism, Political Development, and the U.N., 19 INT'L ORGANIZATION 484, 485 (1965).


Philosophically, there has been an evolutionary development of the U.N.'s attitude toward recognition of self-determination as a right. It began in 1945 and reached a major plateau in 1960 with the Declaration on the Granting of Independence to Colonial Countries and Peoples. R. Higgins, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 91-100 (1963). Since that time the development has continued, and is culminated in the Declaration on Friendly Relations. It can be concluded that such an evolving philosophical attitude at the tables of the U.N. from 1945 to 1960 produced changes in approach and practice by states, which in turn have contributed towards further developments in U.N. policies. This is most evident in the increasing international acceptance of self-determination—as reflected in 1945, in 1960, and now (as this note hypothesizes) in 1970 with the Declaration on Friendly Relations. Therefore, these U.N. expressions, which could be deemed to point only to a present philosophical acceptance of self-determination (as opposed to a present reality), nevertheless will shape future political reality.

Gross, The Right of Self-Determination in International Law, in NEW STATES IN THE MODERN WORLD (M. Kilson ed. publication forthcoming) as cited in Emerson, Self-Determination, 65
of Charter language\textsuperscript{77} ignores the value of reiterative resolutions in affirming and strengthening the existence of the principle of self-determination.\textsuperscript{78} Even though the Charter creates no right to self-determination, the General Assembly's actions concerning self-determination cannot be peremptorily dismissed. There was no opposition in the United Nations to the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,\textsuperscript{79} even though that Declaration treats the right as presently enforceable.\textsuperscript{80} Nor was there opposition to the follow-up resolution which created a committee to make recommendations on the implementation of the right.\textsuperscript{81} "[I]t seems academic to argue that as Assembly resolutions are not binding nothing has changed and that 'self-determination' remains a mere 'principle'."\textsuperscript{82} This is not because "the 1960 Declaration has binding authority (it has not), but because that Declaration taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination."\textsuperscript{83}

If it is assumed that the members voting for these resolutions acted in good faith, it is impossible to conclude that this right does not exist as part of their general customary law. But the nine abstentions\textsuperscript{84} to the 1960 Declaration make it difficult to say the right was one recognized by all. And because these nine included the United States, the United Kingdom, Portugal, France and Belgium—all of which at the time had either a direct or indirect interest in the preservation of the colonialistic status quo, it is questionable to conclude that a viable binding right existed at all. However, although the Special Committee of Twenty-Four\textsuperscript{85} set up to help implement the 1960 Declaration has received only token support in its efforts,\textsuperscript{86} the fact that over 50 states have come into being since 1960 supports the notion that the right to self-determination contin-

\textsuperscript{77}The Charter language in point is found in article 1. See note 56 supra.
\textsuperscript{78}See also South West Africa Cases, [1966] I.C.J. at 292 (Tanaka, J., dissenting). In this case Judge Tanaka declared, "we cannot admit that individual resolutions, declarations, judgments, decisions, etc., have binding force upon the members of the organization." But, he continued, "[t]he accumulation of authoritative pronouncements, such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1(b) [of the Statute of the International Court of Justice]."
\textsuperscript{80}R. HIGGINS, supra note 75, at 100.
\textsuperscript{82}R. HIGGINS, supra note 75, at 101.
\textsuperscript{83}Id. at 104.
\textsuperscript{84}Australia, Belgium, Dominican Republic, France, Portugal, Spain, the Union of South Africa, the United Kingdom, and the United States. UNITED NATIONS REVIEW, January 1961, at 8.
ues to be recognized in fact, if not in words. Taking this general progression, the unanimous approval of the Declaration on Friendly Relations in 1970 is finally conclusive that there exists in general customary law a recognized right of self-determination.

IV. THE VIABILITY OF THE RIGHT AND SUGGESTIONS AS TO ITS APPLICATION

To what practical extent can a people rely on the right of self-determination? In effect, the initial inquiry is a matter of the degree to which a state will consider itself bound to respect this right. For this reason the right may become illusory in many cases. For example, “no quantity of U.N. Resolutions could force Portugal to acknowledge that its territories were non-self-governing.” In order to insure realization of this right, the inquiry must rather be focused on the extent to which the international community will consider itself bound to enforce and protect that right. The basic standard provided in the second paragraph of the principle—“that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights”—will permit a determination of when the United Nations can and should apply its sanctions.

Obviously, United Nations action is demanded in the few remaining citadels of colonialism. These areas include all dependent or non-self-governing territories which are not universally recognized as an actual part of a metropolitan state. While both the 1960 Declaration and the present Declaration established a goal of bringing a “speedy,” and not immediate, end to colonialism, each affected state must carry out this obligation in “good faith.” Hence, in non-self-governing territories, where no action has been taken to apply and implement these Declarations, the United Nations should consider this obligation as breached and take action to enforce implementation. Admittedly, separate instances of breaches of good faith are difficult to determine. But when, for example, a mission from the Special Committee set up to aid in the implementation of the 1960 Declaration is refused admission into a dependent territory by the administering state, a breach should be presumed.

But cf. Gross, supra note 76. “[T]he practice of decolonization is a perfect illustration of a usage dictated by political expediency or necessity or sheer convenience.” Id.

The importance of this unanimity was acknowledged by Abram Chayes in 1963 when, as Legal Advisor of the Department of State, he said that he believed the United States would recognize as existing law “any principle that came from the legal sub-committee and was unanimously approved by the Assembly.” Address by Abram Chayes at Northwestern University, May 1, 1963, 48 Dep’T State Bull. 835, 837 (1963).

Emerson, Colonialism, Political Development, and the U.N., supra note 73, at 496.

The mere claim, however, that a territory is part of the metropolitan state should not be acceptable when used as a subterfuge by recalcitrant colonialists.

The last principle defined in the Declaration on Friendly Relations states, in its last paragraph:

Every state has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law.

This has occurred, for example, during the investigation of Portuguese colonies. See, The United Nations and Decolonization, supra note 86, at 25.
Outside these colonial areas, it is presently doubtful that the right of self-determination can be used to gain the support of the United Nations. Former Secretary General U Thant remarked that the United Nations attitude toward separation of a section of a Member State based on the right of self-determination is unequivocal:

"As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State." 3

Therefore, unless there is a severe change of policy, when the few areas of remaining colonialism meet their "speedy end," the right to self-determination will arguably become moot.

Yet, there will still be peoples within the recognized political boundaries of a Member State being subjugated, dominated, exploited, and denied fundamental human rights. The question is whether these people should be denied a right to self-determination because of the fortuity of their geographical location. The objection most often raised against extending the right to these people is that article 2(7) of the Charter prevents United Nations intervention in "matters which are essentially within the domestic jurisdiction of any state." Thus, under this interpretation intervention to enforce the right is legally impractical. However, this article is subject to many interpretations 4 and is not decisive authority for any such preclusion. Nonetheless, it can be argued that because the right of self-determination is one found in general customary law, not the Charter, it is not affected by article 2(7), which limits only Charter granted rights. Even if this article could be used to inhibit the self-determination of peoples when the situation involved presents a threat to the peace, its operation would be preempted by Chapter VII. 5 Thus, since those self-determination movements supported directly or indirectly by another sovereign state necessarily present a threat to the peace, at least these conflicts would be taken out from under article 2(7) limitations. 6

Perhaps what has been most detrimental to universal application of the principle is an overemphasis on the establishment of independent states as the mode of implementation. 7 Aside from their transgression against the primacy of state sovereignty, secession movements have historically often resulted in

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4 See, e.g., L. Goodrich & E. Hambro, CHARTER OF THE UNITED NATIONS 110-21 (1949); R. Higgins, supra note 75, at 103. The most liberal interpretation is that article 2(7) is irrelevant to the right of self-determination. Id.
5 Article 39 of the Charter gives the Security Council authority to "determine the existence of any threat to the peace . . . [t]o make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." U.N. CHARTER art. 39.
6 For example, article 2(7) would not have prevented intervention by the United Nations in the Indo-Pakistani conflict surrounding the Bengali struggle for independence.
7 See Arangio-Ruiz, Codification of the Principles of International Law on Friendly Relations, supra note 1.
costly civil wars that have more often increased enmities than settled disputes. Although emergence into an independent state is a legitimate mode of implementation, the overemphasis on independence has predominated primarily because of contemporary issues. This emphasis should not be allowed to prejudice implemention of the right by the formation of any other political status by the people concerned. Most contemporary self-determination conflicts probably could be settled more easily if a political status other than independence were proffered by one of the parties. By early implementation of the self-determination principle in the form of a political status acceptable to both the people and the state, it is conceivable that a state striving to maintain control of a vital geographic region and a people struggling to acquire equal rights and a degree of autonomy might both lay down their arms.

The parties would not only be inclined toward peaceful settlement by their own self-interests, i.e., the prospect of an acceptable solution without costly war, but they would also be urged in that direction by such pressure as could be brought by the nations and organs of the world community.

Another obstruction thwarting wide recognition of a universal right of self-determination is the absence of definitive criteria to be used in determining when the right can be invoked. States justifiably withhold recognition of a principle that could possibly be abused as a rhetorical tool for senseless destruction. Due to the complexity of the issue, the determination of whether a particular conflict involves the principle of self-determination must be ascertained largely on an ad hoc basis. Yet certain fundamental circumstances do exist and, as such, can be offered as criteria essential to such a determination.

First, the people asserting the right must be culturally antithetic to those administering the government of the state. Racial, religious, and political animosity should be weighed heavily, whereas mere language or national heritage differences alone would not be determinative. For this criterion the variables are obviously numerous, but they are not indistinguishable. For it is safe to assume in hindsight that the southern United States before 1861 was not so culturally antithetic to the rest of the country as to be entitled to a legal secession. But perhaps the Ibo tribesmen in Nigeria or the Bengalis of Bangladesh exemplify peoples whose culture is inherently adverse to that of their dominators and who would only acquiesce to domination after total defeat. However, this criterion is most subjective and a valid determination can be made only after a comprehensive study of the cultures involved.


See Nanda, supra note 4, at 329-30.
Secondly, there must be some concrete evidence that the people are being
denied basic human rights—as shown, for example, by discriminatory laws or
economic exploitation. Though this criterion is perhaps the most difficult to
determine and the discrimination and exploitation must almost be blatant to
discern, it can at least be implied in a number of ways sufficiently to compel
investigation. For example, violations of the various covenants concerning
human rights could establish this criterion. And exploitation could be presumed
when a particular geographic region of a state is rich in natural resources but
its people are dying of malnutrition.

If the mode of implementation is to be complete independence or even a
semi-autonomous political status, the people must be situated in an area that
is geographically distinguishable from the rest of the state. Though “dis-
tinguishable” is obviously not meant to exclude determinable geographical
areas that are conjunctive to or even surrounded by the remainder of the state,
the fact that a region is physically distinct from the rest of the state may weigh
heavier than if it were more a physical part of the state. The farther away the
area the heavier the factor weighs. There are two considerations in assessing
this geographical function: 1) the practical problem of the separability of the
region; and 2) the likelihood that an incurable incompatibility exists between
the peoples of the regions. Thus, purely as a geographic illustration, it may be
remarked that Bangladesh was a more favorable situation for a lawful secession
than Biafra or Katanga. At the same time, because the geographical boundaries
must be distinguishable, Biafra would be more amenable to a right to secede
than would black nationalists in the United States or the Catholics in Ulster.

However, this last criterion must not be allowed to prejudice accessibility of
the right in situations where the people in question meet the first two criteria
but have no common geographical identity. In such cases it is likely that the
desired mode of implementation is only that the people be given a political
status equal to that of the people governing them. Of two possible modes of
seeking this status an internationally enforced right of self-determination is
undeniably more desirable than terroristic coercion.

V. Conclusion

A realistic examination of the right of self-determination as it presently
exists produces a frustrating conclusion. While a Declaration purporting to
represent a consensus of the world community states the right in functional and
and universal terms, individual statements from the world community clearly
indicate that the right is barely functional and certainly not universal.

Though frustrating, this conclusion is predictable. Traditionally, interna-
tional relations have been based upon the concept of state sovereignty. The
sovereign state is the basic element of the United Nations and newly independ-
ent states entering that organ cling most defensively to this concept. It is,
therefore, understandable that a principle which transcends the foundation of
the status quo be given only nominal endorsement by those prospering in that
status quo. Yet, it is said that the concept of sovereignty is eroding, that “[t]he
world has outgrown sovereignty."

If it is true that the state in its sacrosanct sovereign capacity is no longer to be the fundamental unit in international relations, what new unit is to insure the peace and human dignity basic to an ordered international civilization?

Human dignity demands certain fundamental human rights. Obviously separate individuals cannot alone protect these rights, and states too often have proved incompetent or unwilling to provide adequate protection. If there is to be any substance to the concept of human dignity, it must ultimately be insured by the collective will and efforts of those people whose rights are in question. Historically, the only peoples capable of successfully effectuating their collective will have been those with political or military strength and not necessarily those concerned with guaranteeing their fundamental human rights. Thus, the protection of human dignity becomes interrelated with world peace, in that the latter is often dependent upon the manner in which this collective will is asserted and, therefore, both must be essential factors in the structure of an international order. Were there a vehicle by which a people could demand human dignity and be assured of this dignity by the international community, the prospect of world peace would be enhanced immeasurably. It is suggested that the principle of self-determination, as codified in the Declaration on Friendly Relations, would offer such a vehicle.

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