

THE NORM OF SELF-DETERMINATION, 1941-1991

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ABSTRACT

Based on historical research in the U.S. archives, the article demonstrates that the normative principle of self-determination passed into customary international law through the August 1941 Atlantic Charter, which (1) is currently listed by the U.S. as an extant treaty, and as an appendix to the January 1942 Declaration by the United Nations, (2) was frequently stated in wartime diplomatic exchanges and public pronouncements as the basis for allied commitments and conduct, (3) was relied on by leaders, populists and dependent peoples worldwide, (4) was the basis for planning for today's global order (including the U.N. systems for non-self-governing and trust territories), (5) was regarded as normative by several contemporary scholars, and (6) has been formally invoked, e.g., in relation to the 1954 Pacific Charter.

The Atlantic Charter's valued principle of "humanitarian universalism" is immanent in its function as a norm benefitting colonial and other peoples forcibly deprived of their human rights or sovereignty. The backdrop is the literature on the post-1945 origins of the U.N. and general "right" of self determination.

I. INTRODUCTION

There is an apparent doctrinal consensus that the right of self-determination of people and nations is recognized by international law. The consensus gradually emerged since signature of the U.N. Charter in 1945. By the mid-1980s the consensus was firmly established although no notable writer is known to have identified any particular date when the right emerged. As Hannum recently put it, "it would seem difficult to question its status as a right in international law."¹ Nevertheless, a number of questions remain unsettled. The first relates to the juridical nature and origins of the right or norm, such as its formal source, the date of its origination, technical

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1. HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION—THE ACCOMMODATION OF CONFLICTING RIGHTS* 45 (1990). See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 595-98 (4th ed. 1990).

structural issues, and its historical provenance. Second, is the fundamental question of the value basis of the norm—whether, for instance, it is based on concerns about global peace and security or human rights. Third, there are questions relating to the norm's scope, including whether it is restricted to the types and cases of colonial territories existing in 1945, whether it embraces a generic right of secession and whether it is preemptory and non-derogable.

After a broad survey of doctrine, this article takes the position that these questions have been answered in the Atlantic Charter of August 1941. Based on materials in the U.S. archives, this article examines the motivations for the Charter; its contributions to the present world order, a neglected subject; and the instrument's juridical status. Although the Atlantic Charter is partly discussed in a conventional frame, this article is, in part, an essay on customary international law, focusing mainly on evidence of practice and the *opinio juris* of the world's leading power.

II. UNITED NATIONS CHARTER PROVISIONS AND UNITED NATIONS ACTIONS ON SELF-DETERMINATION

A. Sources and Evidences of the Law of Self-Determination

Part III surveys doctrine since 1945, the year of the conclusion of the U.N. Charter. The doctrine has included very limited original research on international conventions and actual general state practice, the two sources of international law acknowledged by Article 38 of the Statute of the International Court of Justice.² The doctrine has been mainly concerned with practice related to the United Nations and its Charter. This has largely focused on analysis of state practice within the organization, especially voting behavior, and/or organizational activity. This activity has been treated as: a species of state practice; a hermeneutical play-house, where much has turned on the application to a widely-subscribed-to international convention of a bewildering variety of interpretative techniques; and what might be called autochthonous international organizational law.³

Because the doctrine is directed toward the United Nations, this Part provides an introduction to U.N. Charter provisions and actions on self-determination.

The time frame covered commences in 1945. Where possible, I have arranged the presentation in broad chronological bands, noting that, in some cases, one can discern changes in a writer's viewpoint, *e.g.* where he or she

2. Statute of the International Court of Justice, June 26, 1945, *entered into force*, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

3. This concept bears a direct relationship to the growing body of "U.N. law" *inter alia* epitomized by and largely stemming from such seminal ICJ decisions as *Certain expenses of the United Nations* (Advisory Opinion), I.C.J. Rep. (1962); *Reparation for Injuries Suffered in Service of United Nations* (Advisory Opinion), I.C.J. Rep. (1949).

is the author of several editions of a treatise. Naturally, when a writer appears to have written only once on a subject, his or her views tend to get frozen in the subsequent literature, one of the reasons why doctrine is often such an unreliable evidence of the law. As Judge Amoun noted in his separate opinion in the 1971 *Namibia* case,⁴ the work of a brilliant honors-list of past writers compels respect, but such writers "except for a few great minds, [cannot] be thought to have had such a vision of the future that they should always see beyond their own times."⁵

Although the doctrine is voluminous and I can provide only a representative sample, one might recall Judge Petré's separate opinion in the 1974 *Western Sahara* case,⁶ and note that,

in relation to decolonization, the wide variety of geographical and other data which must be taken into account . . . have not yet allowed the establishment of a sufficient developed body of rules and practices to cover all the situations which may give rise to problems. In other words, although its guiding principles have emerged, that law . . . does not yet constitute a complete body of doctrine and practice . . .⁷

B. The U.N. and Self-Determination

1. U.N. Charter provisions

Most of the doctrine surveyed is related to the U.N. Charter provisions on self-determination, particularly in the sub-field of decolonization. Article 1(2) states that among the purposes of the United Nations is the development of friendly relations among nations "based on respect for the principle of equal rights and self-determination of peoples, and the taking of other appropriate measures to strengthen universal peace."⁸ Article 55 requires the organization to promote certain social and economic goals: solutions for international economic, social, health and related problems; "international cultural and educational cooperation," and "universal respect for, and observance of, human rights and fundamental freedoms for all . . ." Article 55 provides that its prescriptions are "[w]ith a view to the creation of conditions of stability and well-being which are necessary for *peaceful and* friendly relations among nations based on respect for the principle of equal

4. Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding U.N. Security Council Resolution 276 (1970), (Advisory Opinion) [hereinafter *Namibia*], Sep. Op. by Judge Amoun, I.C.J. Rep. 75 (1971).

5. *Id.* at 75.

6. *Western Sahara* (Advisory Opinion), I.C.J. Rep. 14 (1975).

7. *Western Sahara* (Advisory Opinion), Sep. Op. by Judge Petré, I.C.J. Rep. 14 (1975).

8. Charter of the United Nations, June 26, 1945, *entered into force*, October 24, 1945, 59 Stat. 1031, T.S. No. 973, 3 Bevens 1153 [hereinafter U.N. CHARTER].

rights and self-determination of peoples . . .”⁹

Chapter XI of the U.N. Charter is a Declaration Regarding Non-Self-Governing Territories, the heart of which is Article 73, whereby U.N. members administrating

territories whose peoples have not yet attained a full measure of self-government [1] recognize the principle that the interests of inhabitants of those territories are paramount, and [2] accept as a sacred trust the obligation to promote to the utmost . . . the well-being of these territories . . . [To that end, such members undertake several specific obligations,]

- (a) self-government, to take due account of the political aspirations of the peoples, to assist them in the progressive development of their free political institutions according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . . ;
- (b) to further international peace and security; [and] . . .
- (c) to transmit regularly to the Secretary General for informational purposes . . . statistical information and information of a technical nature relating to economic, social, and educational conditions . . .¹⁰

The text of Chapter XI is evidently *in pari materia* with that of Articles 1(2) and 55.

So is that of Chapter XII, which provides for the “International Trusteeship System” for territories to be called “trust territories”¹¹ which, in 1945, were under League of Nations mandates; were, as a result of World War II, detached from enemy states; or might be voluntarily placed under the system. The basic objectives of the system, “in accordance with the Purposes . . . laid down in Article 1,”¹² including the principle of self-determination, include:

- (a) to further international peace and security;
- (b) to promote the political, economic, social and educational advancement of the inhabitants . . . and their progressive development towards self-government or independence as may be appropriate to the peculiar circumstances of each and its peoples and the freely expressed wishes of the peoples concerned, and as may

9. *Id.* (emphasis added).

10. See Emil Sady, *Colonial Setting of the United Nations Charter*, in ROBERT ASHER & ASSOCIATES, *THE UNITED NATIONS AND PROMOTION OF THE GENERAL WELFARE* 815, 834-37 (1957).

11. U.N. CHARTER, *supra* note 8, art. 75.

12. U.N. CHARTER, *supra* note 8, art. 1.

- be provided by the terms of each trusteeship agreement;
 (c) to encourage respect for human rights and for fundamental freedoms for all . . .¹³

The organization's activities in relation to these Charter dispositions have been diverse. They have included a variety of Monitoring Functions. Those activities most clearly and directly authorized are the consideration by the U.N. Trusteeship Council of reports by administering authorities in relation to trust territories. The reports are partly based on responses in a questionnaire submitted by such authorities on the political, economic, and educational advancement of each territory's inhabitants. In relation to trust territories, the organization's functions have also included the Council's duty to accept and examine petitions; periodically to visit territories, and annually to report to the U.N. General Assembly on the basis of each questionnaire.¹⁴ The most noteworthy and far-reaching expressions of these activities, in relation to trust territories, have been visiting missions and participation in exercises of ascertaining the popular will¹⁵ prior to the severance of relations with the relevant administering authority.

Commencing in 1946, the General Assembly devoted increasing attention to monitoring non-self-governing, non-trust, territories through the elaboration of Article 73(e) on the transmission of information, spending considerable deliberative time elaborating on the range, quality and quantum of information to be supplied and factors to be used to determine which territories should be excluded or, having been included, later excluded. The General Assembly also expended substantial energies in establishing, firstly, successive ad hoc committees and later, a permanent committee on information.¹⁶

From its earliest days, the General Assembly also sought to monitor, at least by discussing, non-trust territories experiencing specific difficulties. In the early phase of this activity, questions were routinely raised about the Assembly's authority. Regularly, these were answered affirmatively by the majority of speakers and resolutions. The issues sometimes were as far-reaching as the General Assembly's competence to decide or discuss: whether a plebiscite should be held in a particular territory, disputed claims to territory, and the application of Article 103 of the Charter (providing for the

13. Sady, *supra* note 10, at 837-40.

14. ASHER, *supra* note 10, at 944-66.

15. Through plebiscites and elections, supervised by the U.N. or the administering states. See Thomas Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694, 699-709 (1976).

16. ASHER, *supra* note 10, 878-920; ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 110-12, 114-16 (1963); UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 64-66 (1972); A. RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION 55-57 (1973); AURELIU CRISTESCU, THE RIGHT TO SELF-DETERMINATION: HISTORY AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS 35 (U.N. Doc. A2 E/CN.4/Sub. 2/404/Rev. 1-1981).

prevalence of the U.N. Charter in the event of a conflict with a member's non-Charter treaty obligations). In these situations, the organization consistently upheld it as paramount and the authority of its Charter's provisions, including those on self-determination.¹⁷ In particular, from an early date it was established that pleas of domestic jurisdiction based on U.N. Charter Article 2(7) could not defeat the organization's competence.¹⁸ Especially after 1961, the year after the adoption of Resolution 1514(XV), discussed below, the organization also monitored non-trust territories in connection with ascertainment of the popular will prior to the severance of relations with administering authorities.¹⁹

The organization has also been very active in elaborating on the extensive body of Permanent Instruments and Machinery which has allegedly evolved into a *U.N. Law of Decolonization*. The first such activity was the ongoing debate regarding the preparation of the two International Covenants on human rights, signed in 1966—one on Civil and Political Rights, the other on Economic, Social and Cultural Rights.²⁰ Common Article 1, the sole provision in Part 1 of each of these Covenants, provides that:

(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) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic cooperation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

(3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

17. Sady, *supra* note 10, at 922-33; HIGGINS, *supra* note 16, at 91-104; UMOZURIKE, *supra* note 16, at 75-87; SUREDA, *supra* note 16, at 59-67, 74, 76 & 77-93.

18. HIGGINS, *supra* note 16, at 104.

19. Franck, *supra* note 15, at 700-01; SUREDA, *supra* note 16, at 70-73.

20. International Covenant on Economic, Social And Cultural Rights, Dec. 16, 1966, *entered into force* Jan. 3, 1976, U.N. G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967); International Covenant on Civil and Political Rights, Dec. 16, 1966, *entered into force* Mar. 23, 1976, U.N. G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967). See MOHAMMED SHUKRI, *THE CONCEPT OF SELF-DETERMINATION AT THE UNITED NATIONS* 241-52 (1965); HAROLD JOHNSON, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS* 37-41 (1967); UMOZURIKE, *supra* note 16, at 48-50; LEE BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* (1978); CRISTESCU, *supra* note 16, at 27-34, 44-45; Patrick Thornberry, *Self-Determination, Minorities, Human Rights: a Review of International Instruments*, 38 INT'L & COMP. L.Q. 867, 877-84 (1989).

The Civil and Political Covenant is now in force for nearly 90 States; the Economic, Social and Cultural Covenant for over 90 States.

Proposed by the Soviet Union in 1960, the United Nations' most significant and comprehensive effort has been Resolution 1514(XV), the Declaration on the Granting of Independence to Colonial Peoples And Territories, adopted by the U.N. General Assembly on December 14, 1960. *Inter alia*, it declares that "alien subjection, domination and exploitation constitutes a denial of human rights;"²¹ "[a]ll peoples have the right to self-determination;"²² "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence;"²³ "[i]mmediate steps shall be taken in . . . all . . . territories which have not yet attained independence to transfer powers to the peoples . . . in accordance with their freely expressed will and desire . . ." ²⁴ Significantly, the Declaration was adopted 89-0-9 (in opposition was Australia, Belgium, Dominican Republic, France, Portugal, South Africa, Spain, the United Kingdom, the United States).²⁵ One day after it adopted the 1960 Declaration, the General Assembly adopted Resolution 1541(XV) containing a number of principles which should guide members in determining whether an obligation exists to transmit the information called for under Article 73 of the Charter.²⁶ Together, Resolution 1514(XV) and 1541(XV) constitute a substantial development in internal U.N. jurisprudence.

In November of 1961, the General Assembly established a 17-state Committee specifically to make recommendations on the progress and implementation of Resolution 1514(XV). In 1963 the membership was expanded to twenty-four, the committee eventually becoming popularly known as the Committee Of Twenty-Four. Through that Committee, the organization eventually performed much of the monitoring functions referred to earlier.²⁷ It also prepared a large number of resolutions²⁸ which the General Assembly has adopted on specific territories, on armed and other support for liberation movements and on self-determination in connection with economic development and permanent sovereignty over natural

21. Declaration in the Granting of Independence to Colonial Countries and Peoples, adopted by the U.N. General Assembly, Dec. 14, 1960, U.N. G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

22. *Id.* para. 2.

23. *Id.* para. 3.

24. *Id.* para. 5.

25. JOHNSON, *supra* note 20, at 41-50; UMOZURIKE, *supra* note 16, at 69-74; W. OFUATEY-KUDJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 120-21 (1977); CRISTESCU, *supra* note 16, at 39; Note, *Territorial Claims as a Limitation to the Right of Self-Determination in the Context of the Falkland Islands Dispute*, 6 FORDHAM INT'L L.J. 443, 450 (1983) [hereinafter *Fordham Note*].

26. OFUATEY-KUDJOE, *supra* note 25, at 115-25; *Fordham Note*, *supra* note 25, at 451.

27. UMOZURIKE, *supra* note 16, at 74-75; HANNA BOKOR-SZEGO, NEW STATES AND INTERNATIONAL LAW 22 (1970). See *supra* notes 9 & 10 (concerning the U.N.'s monitoring function).

28. See BUCHHEIT, *supra* note 20, at 34.

resources.²⁹

The express objective of many of these resolutions has been to interpret the terms of the Charter, particularly those which were earlier adumbrated. One resolution, the sole purpose of which was definitively to interpret in a progressive developmental manner³⁰ a portion of the U.N. Charter,³¹ is the General Assembly 1970 Resolution 2625(XXV), the Declaration on Principles of International Law Concerning Friendly Relations And Cooperation Among States in Accordance with the Charter of the United Nations. That Declaration, which was adopted by consensus, contains an eight-paragraph principle on "equal rights and self-determination of peoples."³² The first paragraph states the right of all peoples "freely to determine . . . their political status and to pursue their economic, social and cultural development"³³ and the duty of every state to respect this right. Paragraphs 2, 3, 5, and 8 state several other state duties, mainly of a promotional and abstentional nature. The fourth paragraph identifies three possible modes of implementing the right to self-determination.³⁴ The sixth paragraph stresses the separateness and distinctness of each non-self-determined entity from the administering state; and the seventh paragraph is a saving or internal interpretation clause concerning non-dismemberment.³⁵

III. DOCTRINAL SURVEY ON SELF-DETERMINATION

A. Formal Sources of Law

1. 1940s and 1950s

There is no mention of an independent right of self-determination in the

29. BOKOR-SZEGO, *supra* note 27, at 22-23; S. Prakash Sinha, *Has Self-Determination Become a Principle of International Law Today?*, 14 IND. J. INT'L L. 332, 337-40 & 342-48 (1974); BUCHHEIT, *supra* note 20, at 35; HECTOR GROS ESPIELL, *THE RIGHT OF SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 8*, U.N. Doc. E/CN.4/Sub2/405/Rev. 1 (1980); CRISTESCU, *supra* note 16, at 48-53, 75-79 & 100-18.

30. The expressions "progressive development of international law," and "codification" of international law are mentioned in Article 13 of the U.N. Charter, which required the General Assembly to initiate studies and make recommendation in both fields.

31. U.N. CHARTER, art. 1, on purposes, and U.N. CHARTER, art. 2, on principles.

32. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, adopted by U.N. General Assembly, Oct. 24, 1970, *The Principle of Equal Rights and Self-Determination of Peoples*, U.N. G.A. Res. 2625 (xxv), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc.A/8028 (1971), [hereinafter *Friendly Relations Doctrine*].

33. *Id.*

34. Sovereignty cum independence; free association with an independent State; or the emergence into any other political status freely determined by a people.

35. CRISTESCU, *supra* note 16, at 54-73; Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713 (1971).

surveyed textbooks of the 1940s.³⁶ However, in Kelsen's and in Bentwick and Martin's work on the United Nations, the reference to self-determination in Charter Article 1(2) is considered to be merely a reaffirmation of the sovereign equality of nations. In the first half of the 1950s, Briggs' teaching materials noted that there was no right of self-determination under customary international law, though at times it was granted by treaty or national law.³⁷

Turning to articles, in 1957, Rivlin noted that although "procedures for the realization of the right came to be incorporated in international law through such instruments as the [League of Nations] mandates system," the right of self-determination was not itself a legal concept.³⁸ Nevertheless, Eagleton, writing in 1953, had not been prepared to concede even a limited validity to self-determination in the context of the United Nations. He complained about how the term "was crowded into Article I of the Charter without relevance and without explanation;"³⁹ and that "upon that basis delegates [were] . . . making fantastic claims."⁴⁰ He said the it was "sad to see a noble word abused,"⁴¹ and that the irresponsibility of the delegates was "typical of wild claims being made in other fields such as Human Rights . . ."⁴² However, the next year Quincy Wright said that it seemed clear that U.N. members ratifying the Charter had undertaken legal obligations in respect to self-determination of peoples within their territories. This derived from Articles 1(2), 55 and 56.⁴³ In 1956, Magarasevic, agreed that the U.N. Charter brought self-determination into international law as a new positive principle, the respect and furtherance of which was a legal obligation of members, *i.e.* imposed by convention. He thought that it was evolving from an international legal principle into a rule of international law. Practice within and outside the United Nations was manifesting "legal conscience in the . . . community of states"⁴⁴ and the U.N. resolutions had to be considered as a transitional legal form in the evolution of international law⁴⁵ and even as a source of international law.

36. HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 99-101 (1950); N. BENTWICK & A. MARTIN, *A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS* 7 (1950). See generally LASA OPPENHEIM, *1 INTERNATIONAL LAW—PEACE* (5th ed. 1937); *Id.* (6th ed. 1947); JAMES BRIERLY, *THE LAW OF NATIONS—AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* (4th ed. 1949); CHARLES HYDE, *INTERNATIONAL LAW—CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* (2d ed. 1945).

37. H. BRIGGS, *THE LAW OF NATIONS* 65 (1952).

38. Benjamin Rivlin, *Self-Determination and Colonial Areas*, INT'L COUNS. No. 501, 195 & 199 (1955) (citing A. Quincy Wright, *Recognition and Self-Determination*, AM. SOC. INT'L L. PROC. 23-27 (1954)).

39. Clyde Eagleton, *Excesses of Self-Determination*, 31 FOREIGN AFF. 592, 593 (1953).

40. *Id.*

41. *Id.*

42. *Id.*

43. Wright, *supra* note 38.

44. See Alesandar Magarasevic, *A View on the Right of Self-Determination in International Law*, JUGOSLAVENSKA REVISTA ZA MEDUNARODNO PRAVO 27, 32 (1956).

45. *Id.*

Turning to the second half of the 1950s, in 1958, Starke, apparently denying the validity of the concept, remarked that despite the U.N. Charter provisions and the two draft International Covenants, whose status as mere drafts he emphasized, several important states denied that such a right existed; and customary international law conferred no right upon dependent peoples or entities to statehood.⁴⁶

2. The 1960s

In the 1960s, some of the doctrine was more positive. On the issue of self-determination in customary law, Manfred Lachs, writing in 1960, argued that the U.N. Charter provisions did not create a new rule of law; they confirmed and laid down "in writing a principle which had long been growing and maturing in international society until it gained general recognition." The Charter had now given expression to and confirmed "one of the [existing] elements of international law," which "derive[d] its legal force from a general principle of law . . ."⁴⁷ By 1963, Starke, like Margarasevic, was acknowledging that determinations of the organs of international institutions may represent intermediate steps in the evolution of customary rules, particularly those governing the functioning of these institutions. In fact, Starke noted, in the previous five years there had been a wide recognition of the right of self-determination and the correlative duty of the administering powers to transfer full powers to the people of such territories. In 1965, Lauterpacht, with an eager eye for extensions of human rights institutions, cautiously called self-determination the most important point of contact between law and human rights.⁴⁸

On the issue of U.N. law, of those writers surveyed who wrote in the early 1960s, Starke, as we have seen, came closest to blending customary international law with conventional law. Despite the progressive nature of his views, Lachs also stressed that the U.N. Charter's Chapters XI and XII were *lex ex contractu* and not generally binding. On the more specific issue of interpretation of the U.N. Charter, he concluded that Resolution 1514(XV) was a valid exercise in interpretation of Article 1(2), removing ambiguities regarding the principle and its meaning.⁴⁹ By 1963, Brierly was viewing the language of Article 73, like that of Articles 55 and 56, as connoting true

46. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 102 (4th ed. 1958).

47. Manfred Lachs, *The Law in and of the United Nations*, 1 IND. J. INT'L L. 429, 432 (1960-61).

48. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 50-51, 116 (5th ed. 1963). Nevertheless, there was a need for a detailed definition of the extent and limit of the emerging right. *Id.* at 116. Reflecting on the position in 1958 (the date of his 4th ed.), Starke noted that prior to that year "it could be said that customary international law conferred no rights upon dependent persons or entities to statehood, although exceptionally some such right ad hoc might be given by treaty or arise under the decision of an international organization." *Id.* at 117. Elihu Lauterpacht, *Some Concepts of Human Rights*, 11 HOW. L.J. 264, 273 (1965).

49. Lachs, *supra* note 47, at 434, 437-40.

legal obligations for U.N. members, even though no legal machinery was provided for their application.⁵⁰ In the same year, Higgins published her much quoted monograph, *The Development of International Law by the Political Organs of the United Nations*. One of her very firm conclusions, based on U.N. practice,⁵¹ was that it seemed “inescapable that self-determination [had] developed into an international legal right, and [was] not an essentially domestic matter, though the extent and scope of the right [was] still open to some debate . . .”⁵²

In 1965, Van Glahn somewhat cautiously expressed a similar view, to the effect that while “no decisive ruling appear[ed] to have been delivered on” self-determination, “it appear[ed] that many delegations to the [United Nations] favor[ed] a withdrawal of these matters from the sphere of domestic jurisdiction.”⁵³ In his 1965 book on the United Nations and self-determination, Shukri reported, apparently not favorably, on the developments regarding domestic jurisdiction. However, though approving it, he referred to the general principle expressed in Article 1(2) as being “abstract” and “without decisive connotation or scope of application,”⁵⁴ thus leaving the matter of definitions and implementation to future agreement and practice of the parties to the U.N. Charter.

In that year Emerson, arguing that the fact that Article 73 imposed minimal obligations and no supervisory machinery was due to no misunderstanding. He remarked that Resolution 1514(XV) could, “without too gross [an] exaggeration be taken as almost an amendment of the Charter,” and a drastic extension of the anticolonial activities of the U.N.⁵⁵

This perception of an extension and the emergence of the strident voices of many new members which were former colonies, probably contributed to

50. JAMES BRIERLY, *THE LAW OF NATIONS—AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 177 (6th ed. 1963). However, he thought that it was debatable whether the U.N. had authority under Article 22 (authorizing the establishment by the General Assembly of “such subsidiary organs as it deems necessary for the performance of its functions”) to establish a sub-committee along the lines of the Trusteeship Council to examine into and report upon the administration of colonial territories. *Id.*

51. See *supra* notes 14-19, regarding U.N. practice in relation to non-self-governing territories.

52. HIGGINS, *supra* note 16, at 103-04.

53. GERALD VON GLAHN, *LAW AMONG NATIONS—AN INTRODUCTORY TO PUBLIC INTERNATIONAL LAW* 485-86 (1st ed. 1965).

54. SHUKRI, *supra* note 20, at 73, 76 & 298-300. In evaluating the legal efficacy of Res. 1514(XV) and other U.N. General Assembly resolutions, Shukri mentioned the distinction between individual practice of states and the collective action of the United Nations, noting that the disparity between the two marred the latter as being “conclusive evidence” of customary international law, *id.* at 345. He concluded that while self-determination had become an operative principle within the system of the United Nations and commanded such moral force as to make it mandatory, the General Assembly recognized several political limitations thereon. Therefore, it could not be considered an absolute legal principle creating absolute legal rights and obligations, although it went beyond a policy to be selectively applied. *Id.* at 338-50, especially 345-46 & 349-50.

55. Rupert Emerson, *Colonialism, Political Development and the United Nations*, 19 INT’L ORGANIZATIONS, 484, 488-93 (1965).

strongly-expressed negative Western views in the second half of the 1960s. On the issue of self-determination as a customary international legal norm, Schwarzenberger categorically wrote that it was a "formative principle of great potency but not part and parcel of international customary law," while Verzijl declaimed against the so-called "right," which had

always been the sport of national and international politics and ha[d] never been recognized as a genuine positive right of "peoples" of universal and impartial application, and it never will, nor can be so regarded in the future.

[It] . . . never formed, nor [did] it [then] form . . . part of positive international law, and neither will it presumably ever in the future become, or ever be capable of becoming the subject of a genuine rule of international law vested with an enforceable universal validity and binding authority on all the members of inter-state society . . .⁵⁶

However, some writers, denying the general customary law validity of the purported legal norm, did admit that it could be adopted voluntarily or contractually by pairs or limited groups of states.⁵⁷ Thus, Sinha's 1968 examination of instances of state practice in connection with changes of political status of various geo-political entities, noted that while references to self-determination were made in several instances, *e.g.* in treaties related to the creation of groups of states and in declarations and resolutions of international organizations, in most other cases no mention was made of the principle or the underlying concept. This occurred in such situations as the re-establishment of a state, the merger of states, the transfer of territories, the ending of wars over territories and the establishment of international authority or administration. He concluded that it could not be said that the principle had acquired a general recognition by states as being obligatory. At best, he noted,

there seems to be emerging a norm whereby, once the basic decision for political reorganization or redistribution of power has been made, a principle of self-determination is applied to obtain the desired result in a desirable fashion. But the norm is not of law as yet.⁵⁸

56. JAN H. VERZIJL, 1 *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 324, 557 (1968); GEORG SCHWARZENBERGER, 1 *A MANUAL OF INTERNATIONAL LAW* 67 (4th ed. 1966).

57. VERZIJL, *supra* note 56, at 324, 557; SCHWARZENBERGER, *supra* note 56, at 67; Dr. Martin Bos, *Self-Determination by the Grace of History*, 15 *NETH. INT'L L.R.* 362, 272 (1968).

58. S. Prakash Sinha, *Self-Determination in International Law and its Application to the Baltic Peoples*, in *RES BALTICA* (Adolf Sprudz & Armins Ruis eds., 1968). Our analysis is based on Sinha's fuller exposition given in Sinha, *supra* note 29, at 351-58 & 361.

It should be noted, however, that Sinha seemed to place excessive store in whether or not the specific expression self-determination was mentioned in the instrument and that his research failed to examine a representative sampling of the general non-treaty practice of the large numbers of states whose isolated treaties or other acts he described.

Turning to aspects of self-determination related to the U.N. Charter provisions, in 1967, Pace quoted the United States view, expressed by Eleanor Roosevelt in the General Assembly's Third Committee, that the right of self-determination was not merely a future hope but a living reality expressed in the Charter and binding on all member states, whether or not they ratified the International Covenants.⁵⁹ In 1968 de Visscher, with his usual discreet lucidity, asserted that the proclamation of Article 1(2) was

not sufficient to introduce into positive international law so vague a notion as the self-determination of peoples . . . , we [could not] reject a priori the idea of help in the solution of these problem from a truly enlightened international organization . . . upon which now depends recognition that a new State-entity exists.⁶⁰

Again, however, we must credit Sinha for bluntly stating the contrary case in 1968. After a searching examination of the theory behind U.N. law-making activity, both internal and general, he concluded that although much content had been given to the principle in U.N. practice, it had been applied only to such people as were colonies in 1945. Besides, the practice fell short of that which gave rise to a rule of customary international law, especially since it was difficult to claim that a state's vote in favor of a resolution had been accompanied by its conviction that it was legally bound by the terms of the resolution. Nevertheless, such resolutions did have considerable moral and political weight.⁶¹

3. The 1970s

Although in 1970, Green said that self-determination was "unknown to customary international law,"⁶² for the first half of the 1970s our survey turned-up two discussions affirming a belief in a benign attitude of customary international law. Writing in 1970, Bokor-Szego gave her view that an *opinio juris* had evolved since 1945, and that U.N. activities, described below, had established customary international law. On the other hand,

59. Robert Pace, *The United Nations and Self-Determination*, 30 J. CONTEMP. ROMAN-DUTCH 124, 131 (1967).

60. CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 175 (1968).

61. Sinha, *supra* note 58, at 263 & 265-67.

62. Leslie Green, *Self-Determination and Settlement of the Arab-Israeli Conflict*, 65 AM. SOC. INT'L L. 40 (1971).

Sahovic thought that since Resolution 1514(XV) was an expression of the overwhelming majority of the international community, it could be taken to reflect the general legal conviction of the binding nature of the principle it proclaimed. His general analysis led him to the view that the principle could be considered a legal rule of customary international law.⁶³

In 1972, Umozurike expressed the view that the repeated U.N. resolutions were evidence of state practice which strengthened over the years the customary law of nations against colonialism, even if its illegality was in doubt.⁶⁴ He also remarked that the principle of self-determination was mentioned in the constitutions of several countries and various treaties, thus strengthening state practice, and that by advancing dependent peoples to independence, the administering powers had given firm recognition to the principle in regard to colonial peoples and U.N. declarations and practices had accelerated the emergence of the principle as one of customary international law.⁶⁵

In the 1973 edition of his textbook on international law, Brownlie, having apparently proposed that self-determination was a principle of U.N. law. He referred to several other instruments, such as the Pacific Charter of 1954, where the principle is mentioned and noted that the United States and many other governments supported it, then stated that "[t]he present position [was] that self-determination was a legal principle, and that U.N. organs [did] not permit Article 2, paragraph 7, to impede discretion and decision when the principle [was] in issue."⁶⁶ Although, again he seemed to be discussing U.N. law, he went on to discuss four corollaries of the principle which went beyond concerns of the U.N. Charter as narrowly viewed.⁶⁷

Nevertheless, in 1973, Sir Gerald Fitzmaurice expressed his difficulty of admitting a right of self-determination as residing in an entity not already determined, that is, at present still juridically non-existent. The following year, Sinha returned to the subject of self-determination, setting forth at

63. BOKOR-SZEGO, *supra* note 27, at 25-26, 30; Milan Sahovic, *Principle of Equal Rights and Self-Determination of Peoples*, in PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 338, 340 (Milan Sahovic ed., 1972).

64. UMOZURIKE, *supra* note 16, at 93 & 189.

65. *Id.* at 189. The Constitutions Umozurike mentioned were those of the USSR, France (1958), the Congo (1963), and the Central African Republic (1962). A similar approach relying on the variety and reiteration of U.N. resolutions followed in, Note, *Toward Self-Determination—A Reappraisal as Reflected in the Declaration on Friendly Relations*, 3 GA. J. INT'L & COMP. L. 145, 157-59 (1973). That note also enhanced the issue of the good faith of states voting in favor of U.N. resolutions and the fact that over 50 states had come into being since 1960. In particular, the adoption in 1970 of the Friendly Relations Declaration was "conclusive." *Id.* at 158.

66. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 575-77 (2d ed. 1973).

67. The four corollaries are: (1) no title to territory seized by use of force; (2) self-determination as compensating for the lack by any entity of statehood and the recognition criteria (3) possibly, unlawfulness of intervention against a liberation movement; and (4) the non-appropriation of territory abandoned by an existing sovereign, but inhabited by peoples not organized as a state. *Id.* at 577-78.

greater length the positions he had earlier articulated in 1968.⁶⁸ In that year, Devine argued that the absence of a right of self-determination by customary international law was suggested by the fact that it was perceived to be necessary to include mention of the right in the International Covenants. He thought that no general practice had emerged from the 1960 Declaration because of the voting abstentions of the influential group of colonial states which were a bloc within the U.N., and were principally-affected. Furthermore, there was significant state practice in the opposite direction, including the non-application of self-determination in non-colonial situations. And even though there was an impressive practice of colonial self-determination, it lacked the element of *opinio juris* based, as it was, on expediency and convenience. However, a right of self-determination was probably *in nascendi*.⁶⁹

In the early 1970s there was a similar range of views on questions relating to the U.N. law of self-determination. In tandem with her views on customary international law, Bokor-Szego's 1970 view was that the U.N. Charter was, to a certain extent, a *lex imperfecta*. After 1945, members' colonial policies were, for the first time, judged in terms of the implementation of the right to self-determination. Besides, certain portions of Resolution 1514(XV) were on interpretation of the Charter, but some portions purported to go beyond interpretation and impermissibly into the field of amendment of the U.N. Charter and contrary to the prescriptions of Article 103 of the Charter. In the same year, in an American Society of International Law (ASIL) Panel Discussion on "Self-determination and the Palestinians," Bassiouni reflected on how the prolific history of General Assembly resolutions had certainly established a recurring and confirmed adherence to the principle by those states which voted for the resolutions. The conclusion was therefore warranted that it was a general principle of international law recognized by the world community.⁷⁰

On the other hand, Green, on the same ASIL Panel, subjected the U.N. Charter text to a restrictive interpretation, denied more than any moral force to U.N. resolutions and stressed that little weight could be credited to voting patterns. The next year, Mustafa, while admitting that human rights had some juridical cogency under the Charter, reflected that self-determination was not subsumed under that rubric. Its lack of legal validity was "further borne out by the fact that it was not even listed among the rights defined in

68. Gerald Fitzmaurice, *The Future of Public International Law and of the International Legal System on Circumstances of Today*, in *LIVRE DU CENTENAIRE 1873-1973*, 232 n.85 (S. Karger ed., 1973). S. Prakash Sinha, *Is Self-Determination Passe?*, 12 *COLOM. J. TRANSNAT'L L.* 260 (1973).

69. D. Devine, *The Status of Rhodesia in International Law*, *ACTA JURIDICA* 1973, 109, 185, 191 & 193-94 (1974).

70. BOKOR-SZEGO, *supra* note 27, at 16-17, 28-30; M. Cherif Bassiouni, *Self-Determination and the Palestinians*, 65 *AM. SOC. INT'L L. PROC.* 31, 33 (1971).

the 1948 Universal Declaration of Human Rights.”⁷¹

In that same year a commentary on the 1970 Friendly Relations Declaration, written in a private capacity by a member of the United States delegation on the Committee which drafted the declaration, seemed to express an endorsement of the juridical credibility of the principle when he noted, *inter alia*, that paragraph 1 represented “a significant step in the progressive development of international law”⁷² and that the totality of the Declaration’s language on self-determination provided a moderate and workable text.

Although this is a doctrinal survey, it is convenient to mention some judicial decisions at this point. This is keeping with the identical status in the ICJ statute, of both judicial decisions and doctrine as evidence of or “subsidiary means for the determination of” international law.⁷³ The 1971 Advisory Opinion of the International Court in the *Namibia* case represented a significant endorsement of the U.N. Charter-based principle. There the court, explicitly applying a teleological methodology to the interpretation of the U.N. Charter provisions, held that the subsequent development of international law in regard to non-self-governing territories, made the principle of self-determination applicable to all of the United Nations, and that the concept of the sacred trust was confirmed and expanded to all “territories whose people have not yet attained a full measure of self-government”⁷⁴ quoting the text of Article 73.⁷⁵ A further important stage in this development was Resolution 1514(XV) said the court. Judge Amoun, in his separate opinion, sought to elaborate on the Advisory Opinion by stressing the importance of the evolution of modern international law taking place in the United Nations, especially through the Charter and resolutions thereunder, plus the 55-odd states which had benefitted from the Charter’s provisions since 1945. While the Court appeared to be espousing a rule of internal U.N. law, Judge Amoun seemed to be positing the existence of customary international law, influenced by the former rule.⁷⁶ The *Namibia* opinion was supplemented and advanced by the 1975 ICJ opinion in the *Western Sahara Case*, where the court, citing Articles 1(2), 55 and 56, indicated that the self-determination principle was applicable to all non-self-governing territories, at least as a matter of U.N. law.⁷⁷ This statement might have been designed to remove any doubt about whether *Namibia* was limited to the subclass of League of Nations mandates or U.N. trust territories, which South West Africa had been and Namibia, its successor,

71. Green, *supra* note 62, at 43; Zubeida Mustafa, *The Principle of Self-Determination in International Law*, 5 INT’L LAW. 479, 480 (1971).

72. Rosenstock, *supra* note 35, at 731.

73. Statute of the International Court of Justice, *supra* note 2.

74. *Id.* art. 73.

75. *Namibia*, *supra* note 4, at 73-74.

76. *Namibia*, *supra* note 4, Sep. Op. by Judge Amoun, at 74.

77. *Western Sahara*, *supra* note 6, at 31.

was. The Court held that its conclusion was emphasized by Resolutions 1514(XV) and 2625(XXV), which endorsed the view of the importance of taking into account the wishes of the people.⁷⁸ However, as Judge Petré'n's separate opinion states, this U.N. law was a "veritable law of decolonization [not universal self-determination] . . . in the course of taking shape."⁷⁹

Other affirmative views during that period included Brownlie's opinion that the practice of U.N. organs had established the principle as part of U.N. law and that Resolution 1514(XV) was in the form of an authoritative interpretation of the Charter; Sinha's apparent concession in 1974 that relevant U.N. General Assembly resolutions might be binding as Charter interpretations, and his denial that they somehow created binding obligations under general international law, and Menon's 1975 assertion that a resolution was an amendment of the Charter.⁸⁰

During the early 1970s there was the obvious polarity of views with the possibility that the International Covenants, when ratified, would have juridical effects transcending their conventional status. At one extreme was Mustafa's views that the Covenant did not provide an effective right since "peoples" were not defined scientifically and objectively and the thrust of Article 1 of both Covenants was merely promotional and thus created ambiguity.⁸¹ Sachovic thought that, when ratified, the covenants would be the sole legally binding acts of a treaty nature to be adopted since the U.N. He noted, too, that they clearly provided both for the right of claimant peoples and for duties of states in connection with that right. And Green believed that, since their promulgation in 1966, the Covenants furnished a *jus nascendi*, of a broader than conventional scope.⁸²

The flurry of doctrinal fusillades reached its peak during the late 1970s. Nevertheless one has to look somewhat more diligently for original ideas. The writers generally took a noncritical view of the existence of customary international law. In some cases the writer advanced a minor fresh argument, e.g. Dinstein's 1976 view that it was preferable to regard the right to self-determination as derived not from the Charter's phraseology but from state practice since the U.N.'s establishment, as testified to by the "population explosion," or Shaw's 1977 view that self-determination could

78. *Id.* at 32.

79. *Id.* paras. 54-58. For Judge Petré'n's Sep. Op., see *supra* note 7; see also Sep. Op. of Judge Castro, *id.* at 73-75.

80. BROWNIE, *supra* note 66, at 594, 595; Sinha, *supra* note 29, at 349-51; P.K. Menon, *The Right of Self-Determination: A Historical Appraisal*, 53 REV. DR. INT'L SCI. DIPL. POL. 183, 196 (1975). See also *id.* at 200 & 272 for additional views. Cf. Gras, who thought that the fact that Res. 1514(XV) and other resolutions were followed by the International Covenants suggested that the former had no binding force, Gras, *The Right of Self-Determination in International Law, in NEW STATES IN THE MODERN WORLD* 136, 137 (Martin Kilson ed., 1975).

81. Mustafa, *supra* note 71, at 482.

82. Sahovic, *supra* note 63, at 339; Green, *supra* note 62, at 46. Nevertheless, he was skeptical about whether and, if so, when that law would come to birth.

“possibly” be regarded as a legal right under customary international law, apparently due to “actual state practice” especially within the United Nations.⁸³

More reflective was Ofuatey-Kodjoe in his 1977 work on the *Principle of Self-Determination*. He examined the practice of colonial powers Great Britain, France, the Netherlands, Spain and Belgium; the United States; Portugal and South Africa. His limited examination, largely based on secondary sources, led him to the conclusion that “there ha[d] emerged a general consensus on the meaning of the principle,”⁸⁴ which was his main concern. In that connection, the modalities of Resolution 1541(XV) were, for him, more important than the theatrics of Resolution 1514(XV).⁸⁵ He also concluded that there was “massive evidence of self-determination reaching back to the 1920 Aaland Islands dispute before the League of Nations; the League’s mandates and minorities protection system; the Atlantic Charter; the U.N. Declaration of Liberated Europe; the U.N. Charter, resolutions and declarations; the two International “Conventions” and a number of other inter-state instruments.⁸⁶ He remarked that “[i]nsofar as the principle [could] . . . yield a right in customary international law it [had] essentially been a spill over of generalization from treaty law [and] . . . obligatory declarations, the legal force of which is generally recognized in international law.”⁸⁷

The 1979 edition of Brownlie’s textbook noted that the *Western Sahara* advisory opinion “confirmed the validity of the principle of self-determination in the context of international law.”⁸⁸ This clarified that his discussion transcended U.N. law, although his example was actually drawn from U.N. practice. In 1979, Crawford reasoned that even if U.N. resolutions went beyond the text of the Charter, they were nevertheless capable of constituting state practice of considerable probative importance.⁸⁹

On the specific question of U.N. law, *per se*, views expressed in the last years of the 1970s included Von Glahn’s simple repetition in 1976 of his 1970 assertion that the two international Covenants “oddly enough, assert the right of self-determination or of national sovereignty over natural resources

83. Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT’L & COMP. L.Q. 102, 106-07 (1976); MALCOLM SHAW, INTERNATIONAL LAW 50, 90, 222 (1977). Shaw is somewhat unclear about the mechanics of the evolution of the right.

84. OFUATEY-KUDJOE, *supra* note 25, at 144.

85. *Id.* at 121-48.

86. *Id.* at 149-50. For the Aaland Islands dispute, *see infra* notes 161-64.

87. *Id.* at 178-79.

88. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 595 (3d ed. 1979).

89. Especially, he says, if they are adopted by a large majority of states and acted on generally, thus attaining “quasi-legislative effect.” JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 91 (1979). Furthermore, Crawford felt confident enough to criticize the views of various writers, including Fitzmaurice (*supra* note 68, at 35), Jennings (ROBERT JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (1963)); *see also*, VERZIJL, *supra* note 56, at 99-100, clearly a hallmark of a view of the settled nature of the law.

. . . Neither contains provisions for effective enforcement . . .”⁹⁰ Shaw clearly stated his submission that the right had been “accepted” by the U.N. as a basic principle in the law of the Charter by a process of Charter interpretation. Akehurst thought that Resolution 1514(XV) was a bold interpretation of Article 73 of the Charter and denoted the U.N.’s preoccupation with self-determination in non-colonial contexts. But those “double standards” were inherent in the U.N. Charter and Article 73 was more specific than the general reference to self-determination in Articles 1(2) and 55, which were so vague that it was doubtful whether they created any legal obligation at all.⁹¹

Buchheit’s 1978 discussion summarized views on both sides. Crawford, in discussing the U.N. resolutions in the strictly U.N. law context noted that Articles 1(2) and 55 seemed to be at least primarily referring to sovereign equality of existing states, especially the right of a state to choose its own form of government without intervention. However, Resolution 1514(XV) and others seemed to go beyond the terms of the Charter, however liberally construed, in connoting the meaning of the right of a specific people to choose its own form of government regardless of the wishes of the rest of the state, a meaning implicit in Article 73(b) and 76(b). In 1979, Williams and Mestral also concluded that it was evident from the many U.N. materials that the U.N. right of self-determination was recognized as a legal right.⁹²

4. The 1980s and early 1990s

During this period, the pace of variations on similar themes slows down significantly, when most jurists accept self-determination as a *fait accompli* and, with that, one or other of the ideas about formal sources of law, both the general customary law variety and U.N. law. Here follows a survey of those views. I use the present tense to indicate my assumption that the writers consider their views to be current.

In the early 1980s, two U.N.-commissioned studies on self-determination were published. The first, by Gros Espiell, was mentioned earlier.⁹³ In the other, Cristescu expressed the view that self-determination is a rule of customary international law created by the United Nations and that the resolutions of the General Assembly and the Security Council and decisions

90. GERALD VON GLAHN, *LAW AMONG NATIONS—AN INTRODUCTORY TO PUBLIC INTERNATIONAL LAW* 191 (2d ed. 1970) & 191 (3d ed. 1976).

91. SHAW, *supra* note 83, at 86. This had occurred in the context of a [large] quantum of affirmations of several aims of the resolutions and declarations, especially 1514(XV) and the Friendly Relations Declaration, and the Covenants and (2) “declarations” in specific situations and disputes. *Id.* at 88-89 & 228. *See also* MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 217 (3d ed. 1977).

92. BUCHHEIT, *supra* note 20, at 129-30; CRAWFORD, *supra* note 89, at 90-91; BROWNLIE, *supra* note 86, at 594, 595; SHARON A. WILLIAMS & ARMAND L.D. DE MESTRAL, *AN INTRODUCTION TO INTERNATIONAL LAW* 48 (1979).

93. *See supra* note 29.

of the International Court of Justice have helped to make self-determination a rule of customary international law. A generally similar view is expressed by Meissner.⁹⁴

In his 1985 article on self-determination in the Encyclopedia of Public International Law, Thürer cautiously notes that

Both the United Nations and the majority of authors are alike in maintaining that the principle of self-determination is part of modern international law. There are indeed good reasons for recognizing its legal character, as after its mere inclusion in the United Nations Charter the principle has been confirmed and given more tangible form by a consistent body of State practice and has been embodied among the "basic principles of international law" in the Friendly Relations Resolutions.⁹⁵

He concludes that, apart from the principle's scope as an optional formula for settling particular issues or disputes as a matter of international law, international law recognizes the right of the people of an existing state to choose their own political system and pursue their own development. He also concludes that it also applies, as suggested in 1921 by the League of Nations Committee of Rapporteurs in the Aaland Islands dispute, in situations where the existence and extension of territorial sovereignty is altogether uncertain. Another example is Palestine, where it was used as an absolutely exceptional solution, when a State brutally violates or lacks the will or power to protect human dignity and the most basic human rights. U.N. practice has also led to the principle's clear emergence as a legal foundation of the law of decolonization.⁹⁶ The principle, finally, might possibly be useful as an aid in interpreting existing international law and as a "guiding principle for the development of international law."⁹⁷ Here, however, Thürer largely cites U.N. Articles and examples of various U.N. actions, *e.g.* in regard to Palestine, South Africa and Rhodesia/Zimbabwe, without distinguishing between *de lege ferenda* and *de lege lata*.⁹⁸

On the U.N. law aspect, Cristescu's view is that the General Assembly's recommendations, pursuant to Articles 10, 13 and 14, have created a rule of customary law of the United Nations. At another point, he argues that the U.N. Charter, being a general multilateral treaty, has the character of conventional law. Thus, Articles 1(2), 55, 56 and 73 are binding on the

94. CRISTESCU, *supra* note 16, at 141, 143 & 151. Boris Meissner, *The Right of Self-Determination After Helsinki and its Significance for the Baltic Nations*, 13 CASE W. RES. J. INT'L L. 375 (1981).

95. Daniel Thürer, *Self-Determination*, 8 ENCYCLOPEIDA OF PUB. INT'L L. 470, 473-75 (1985).

96. *Id.* at 475. On the Aaland Islands dispute *see infra* notes 161-64.

97. *Id.*

98. *Id.*

parties. He argues the fact that self-determination is mentioned among the "purposes" of Article 1 and not the "principles" of Article 2 is of little consequence.⁹⁹ Meissner focuses on the U.N. Covenants, which he calls a "decisive step" towards "legalization of the principle of self-determination within the framework of the United Nations."¹⁰⁰ The wording of the Covenants makes it clear that this was a universal *right* valid for all peoples. For him, too, it is significant that before the Covenants came into force in 1976, the right was discussed in detail and confirmed as an international legal principle in connection with the Friendly Relations Declaration and the 1975 Helsinki Declaration on Security and Cooperation in Europe.¹⁰¹

However, the 1981 edition of Von Glahn's textbook remains equivocal, although it changes its position on the subject for the third time.¹⁰² It notes that

The right to independence would logically involve also a frequently voiced claim . . . of self-determination [which] appears to imply the right of any people to choose its own political institutions . . . Yet the Charter of the United Nations, in which equal rights and self-determination are mentioned prominently . . . also speaks in Article 2(4) of the (virtually sacred) territorial integrity of the members.¹⁰³

This, it noted, is an obvious contradiction. However, in actual practice, U.N. members appear to have supported self-determination for colonial peoples only.¹⁰⁴ While the International Covenants speak in unqualified terms, Resolution 1514(XV) contains the qualification regarding the

99. CRISTESCU, *supra* note 16, at 141-47 & 123-28. These interpretative questions have been much debated in the literature. On the question of self-determination's absence from the Article 2 "principles," Cristescu cites the comment of the Rapporteur of Committee II/1 that the distinction between the Charter's Preamble, Principles and Purposes "is not particularly deep going," that the Charter's provisions are "indivisible," and that he hopes that his "explanation [would] dispel any doubts as to the validity or value of any division of the Charter, whether we call it 'Principles', 'Purposes', or 'Preamble'." *Id.* at 128 (citing U. N. CONFERENCE ON INTERNATIONAL ORGANIZATION ("UNCIO"), at 1, U.N. Doc. 885 (June 9, 1945)). It must be noted that even in Article 1(2) self-determination is referred to explicitly as a "principle." Its absence from Article 2 must surely be fortuitous. Whether or not self-determination is a positive norm should, at any rate, be sought elsewhere than in the geography of the Charter.

100. Meissner found significant the fact that before the Covenants came into force in 1976, the right was "discussed in detail" and confirmed as an international legal principle in connection with the 1970 Friendly Relations Declaration and the 1975 Helsinki Declaration on Peace and Security in Europe. Since he immediately goes on to discuss self-determination for the Baltics, he might have mentioned these latter developments largely to establish some form of explicit Soviet agreement or consensus on self-determination for all, including the Baltics.

101. *Id.*

102. For the views expressed in the first edition (1965) and the second and third editions (1970 & 1976) see *supra* notes 53 & 90.

103. GERALD VON GLAHN, LAW AMONG NATIONS—AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 127 (4th ed. 1981).

104. *Id.*

incompatibility with the Charter's purposes and principles of disruption of a state's territorial integrity.¹⁰⁵ Von Glahn's guardedness is a far cry from the anti-U.N. positions expressed by Pomerance in 1981. Pomerance notes that self-determination, in contrast to sovereignty, was not originally perceived as an "operative" U.N. Charter principle, only as one of the *desiderata*; Resolution 1514(XV) was a revolutionary process and an attempt to revise the Charter; and a textual analysis of the various Charter articles does not bear out the conclusions sought to be placed on them. In particular, she argues that the General Assembly has no right to amend the Charter.¹⁰⁶

On the issue of U.N. law, Thüerer asserts that the principle's formulation in Chapters XI and XII, though binding, seems too vague and complex "to entail specific rules and obligations."¹⁰⁷ He prefers to regard them as having "a very strong moral and political force in guiding United Nations organs in the exercise of their powers and functions."¹⁰⁸ However, as a result of subsequent U.N. practice and affirmation in the *Namibia* and *Western Sahara* opinions, self-determination has become applicable to non-self-governing territories, trust territories and mandates.¹⁰⁹

In the closing years of the 1980s and the early 1990s the dust generally settles. Self-determination is generally accepted as a "principle" or as a "right" recognized in customary international law, by parties to specific agreements, and as U.N. law binding all members by virtue of the fact that it represents conventional law, particular custom or a hybrid of both. The contours of this law are evidently shadowy. As Akehurst's 1987 edition notes, repeating one aspect of his earlier view on the U.N. law aspect, "[t]o

105. *Id.* at 128.

106. *Id.* at 127-28. MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 9, 11-13 (1982) (emphasis in original). Pomerance devotes considerable attention to attacking the thesis that Resolution 1514(XV) was law-creative: it was not unanimously adopted; there were cautionary explanations of their votes by several states which voted affirmatively; states often voted a particular way out of concern about "image" not conviction [an argument which would appear to elevate bad faith and cynicism to novel heights]; consensus voting was not a good guide to *opinio juris* and was often a procedural and propagandistic device masking dissensus [this argument, one would more likely assume, should go to the scope of the norm, rather than its existence or validity]; no state had accepted the right of all peoples to self-determination or U.N. resolutions as valid against themselves and, in any such cases, only as a matter of expediency. *Id.* at 63-69. She also raises caveats in relation to the ICJ *Namibia*, *supra* note 4: it was limited to non-self-governing territories and even South Africa had not denied that *Namibia* was such a territory: she also has difficulties with the ICJ *Western Sahara*, *supra* note 6: the three interested States (Mauritania, Morocco and Spain) had already accepted the General Assembly's call for decolonization by referendum; the case conceived the "applicable principles of decolonization" or the "basic principles governing" the General Assembly's decolonization policy; Judge Petren talked about a "veritable law of decolonization" and not "self-determination;" Judge Dillard had gone further but did not support a general right of self-determination. *Id.* at 69.

107. Thüerer, *supra* note 95, at 471-72.

108. *Id.* at 472.

109. *Id.* at 471-73.

put it mildly, Resolution 1514(XV) is a bold interpretation of Article 73.”¹¹⁰ However, he dutifully records that even the states “which had abstained when the resolution was adopted in 1960, had by 1970 come to accept it as an accurate statement of modern international law, a view which was echoed” in the two ICJ advisory opinions.¹¹¹

B. Date of Emergence of the Norm

The above discussion should have demonstrated that, as is often the case, the date on which a purported norm of customary international law emerges is, like the issue of the very existence and terms of the norm, a matter of considerable uncertainty. Most writers and the ICJ have therefore refrained from hazarding a view on the matter, though one could reasonably infer the existence of a distinct majority view that 1960 is critical either in the sense of being the year when a breach occurred or when the dam collapsed.

However another, very rational, view is Wilson’s 1988 suggestion that:

It is all too tempting to grasp seemingly pivotal events like the passage of Resolution 1514(XV) in 1960 or the signing of the 1977 Protocols [of the first Diplomatic Conference on the 1949 Geneva Conventions . . .] as evidence of this change and to ignore the gradual evolution of ideas, as evidenced by the practice of States, which led to these major events. In fact, these seemingly major events are often not revolutionary at all, but just the codification of less noticeable changes which have taken place in many years.¹¹²

This matter will be addressed further when the impact of the Atlantic Charter on self-determination is discussed.

110. MICHAEL AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 287 (6th ed. 1987).

111. See BROWNLIE, *supra* note 1, at 595-98. In this edition he notes that the British government, which had formerly “opposed the general principle, ha[d] in recent years adopted it and applied it ‘in self-defence’ in relation to the questions concerning the status of Gibraltar and the Falklands (or Malvinas).” *Id.* at 579. Brownlie still appears to blend, perhaps accidentally, his discussion of customary and U.N. law. Hannum fully adopts the emergence of U.N. law. HANNUM, *supra* note 1, at 33-34. His view on the emergence of a customary right is heavily influenced by the widespread adherence to the International Covenants. He also takes note of the facts that governments and scholars from all regions and political perspectives also accept the right. *Id.* at 44-45. Cassese recently found that the “woolly and moderate provisions of the . . . Charter” were transferred into a “universal principle having direct impact on international reality” through a “stream of General Assembly” resolutions, and the four 1949 Geneva Protocols on the laws of war to the “crystallization of a general principle endowed with binding force.” ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 133-34 (1986).

112. HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 78 (1988). See also OFUATEY-KUDJOE, *supra* note 25, at 149-50.

C. Forensic Linguistics

In international, as in domestic ("municipal") law, legal analysis sometimes conjures the image of multiple and discordant systems of forensic linguistics, with the practitioners using the same words with varying meanings in the same apparent context—each apparently using different, through unexpressed, concepts and systems of morphology, syntax and, perhaps, phonology. The relatively uninitiated observer, wandering past a learned debate on a legal topic, might be inclined to suspect that the participants in the debate are using different systems.

For instance, in the doctrine and in debates about self-determination, one comes across wildly discordant interpretations of the word "principle" as used in the U.N. Charter. Some of these, given chronologically are: Jennings' 1963 assertion that the generality and "political aspect" of Resolution 1514(XV) deprived it of legal context; that though the principle had legal overtones it was essentially a political principle incapable of exact definition in relation to particular situations, and that it was inexact to speak of a right of self-determination "if by that [was] meant a legal right."¹¹³ In that year, Japan was reported to have challenged the legal validity of a General Assembly resolution because it was based on the self-determination concept which had not yet been internationally established and accepted and which the U.N. Charter recognized as a "principle" not a "right." In her 1963 survey of U.N. debates about self-determination, Higgins reports on intense discussions about whether it was a "right," herself concluding that it seemed "inescapable that self-determination has developed into an international legal right . . ."¹¹⁴

In 1968, Lador-Lederer expressed similar views, noting that in U.N. practice self-determination had been regarded as a right rather than a platonic principle.¹¹⁵ However, Verzijl dismissed it as "intractable as a legal principle and its juristic purport . . . all but undefinable." The asserted right lacked a specified or specifiable holder, and the extent of its possible

113. JENNINGS, *supra* note 89, at 63, 78.

114. Karol N. Gess, *Permanent Sovereignty Over Natural Resources*, 13 INT'L & COMP. L.Q. 398, 414 (1964) (referring to Economic and Social Council (ECOSOC) 32nd Sess., 1178d mtg. at 172). HIGGINS, *supra* note 16, at 100. See generally *id.* at 91-103. She believed that the answer to whether the matter is essentially one of domestic jurisdiction depends on whether the Charter's provisions on self-determination "give rise to international legal rights and obligations or . . . merely generalized aims." *Id.* at 91. In 1978, Buchheit noted that a trend had developed in self-determination talks in the U.N., from the San Francisco Conference until well into the 1950s that was a very useful terminological shorthand for expressing rather cumbersome legal doctrines. Usage of "principle" often connoted that the phrase was meant as a political principle, while usage of "right" connoted a meaning as an enforceable legal right. However, sometimes usage changed, e.g. Eleanor Roosevelt referring to "the principle of the right . . . to self-determination." BUCHHEIT, *supra* note 20, at 128-29. For early views on these matters expressed by delegates at the U.N., see SHUKRI, *supra* note 20, at 68-71.

115. J. LADOR-LEDERER, INTERNATIONAL GROUP PROTECTION: AIMS AND METHODS IN HUMAN RIGHTS 167 (1968).

operation was "floating on the air."¹¹⁶

These remarks were paralleled by Mustafa's 1971 view that the lack of precise definition of the term "as a human right, [made] it difficult to believe that the Charter could have intended to introduce a new concept into positive international law. . . ."¹¹⁷ Writing about common Article I of the International Covenants, he also argued that although it was in operative Part I, "manifests a preambular character" since it preceded Part II, which laid down general rules governing implementation. He also agreed that the words "promote" and "respect," which were used in Article I, were not as far-reaching as "respect" and "ensure," as used in Part II of the Covenants. Furthermore, even if self-determination, a political principle, was given "a legal garb by being incorporated into legal instruments, it would be difficult to enforce it as a legal right; and it is doubtful whether a judicial body would agree to adjudicate an issue purely on the basis of [that] right."¹¹⁸

Even Sahovic, in 1972, thought that the unspecified content of Articles 55 and 56 undoubtedly detracted somewhat from their efficiency. However, that did not abrogate their legal effect, a conclusion substantially similar to reached by Brownlie in 1973. Yet, in 1974, Devine argued that Articles 1(2) and 55 did not even attempt to create a right, that Article 73 was so vague as to lack normative quality and that even if there was such a right, it would be difficult to establish its content.¹¹⁹

However, as we move out of the 1970s and into the 1980s, these linguistic disputations disappear. In 1979, Crawford distinguished between self-determination as a political principle or value and as a putative legal right or principle. He stressed that the former was "too vague and ill-defined to constitute a legal principle, much less a positive legal rule applying of its own force to particular 'peoples' or to 'peoples' in general."¹²⁰ He also noted the "clear but not always articulated distinction"¹²¹ between the identification of territories to which the legal principle of sovereignty applies, and the legal consequences of that principle in its application to territories already determined. While the consequences had been considerably elaborated on since 1945, questions of ambit, *i.e.*, its territorial coverage, had arguably "remained as much a matter of politics as law."¹²²

116. VERZIJL, *supra* note 56, at 323.

117. Mustafa, *supra* note 71, at 480.

118. *Id.* at 482, 487.

119. Sahovic, *supra* note 63, at 338. BROWNLIE, *supra* note 66, at 575-76.

120. CRAWFORD, *supra* note 89, at 88.

121. *Id.*

122. *Id.* at 89. In 1985 Thürer also argued that in the Article 1(1) and 55 setting, the principle could not be applied to the highly various facts of international life and thus possessed primarily a "strong moral and political force in guiding" U.N. organs. Furthermore, Article 1(2) was only one of several possible "measures which strengthening contribute to the universal peace," and therefore needed to be highly flexible. Thürer, *supra* note 95, at 472, 475. However, as late as 1989, Quigley split semantical hairs with his argument that unlike the

This view, therefore, does not appear to quibble about the juridical nature of the legal principle, but warns that it often works in tandem with a political principle of identical name. The same thing can, of course, be said about such juridico-political principles as sovereignty, equality and independence. It is also fitting to remark that this view of the legal universe correctly does not eschew the relevance and validity of a legal norm on account of the fact that it is phrased at a relatively high level of abstraction and generality. As such, the principle of self-determination, even in times when implementing rights have not yet emerged, plays as useful and tangible a function as the principles prohibiting the use of force, requiring states to act in a good faith or to observe their agreements, or allowing states freedom of action in the myriad areas not prohibited by international legal rules. These are specific principles as broad and concrete as the sanctity of human life or the principle sanctioning universal legal authority to any and all States to punish pirates and perpetrators of war crimes.¹²³

D. Atlantic Charter Provenance of the Self-Determination Norm?

This is a short survey of what the doctrine on self-determination has said about the contribution of the Atlantic Charter to the principle or right of self-determination. The 1941 Anglo-American statement of post-war peace aims carried one indirect reference, the First Point, and two direct references, the Second and Third Points, to self-determination, as follows:

First, their countries seek no aggrandizement, territorial or other;
Second, they desire to see no territorial changes that do not accord

Chinese, Spanish, English and Russian texts, the French text of Article 1(2) mentioned "droit a dispoour d'eux meme." Since "principle" in the other versions could include "entitlement" or something else, it was ambiguous and should be read to mean "right." John Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L L.J. 1, 10 (1989).

123. For some views on legal principles see Edward A. Laing, *International Economic Law and Public Order in the Age of Equality*, 12 LAW & POL'Y INT'L BUS. 727, 746-48 (1980). For a seminal discussion about the international legal system's "permissive" approach, alluded to in the text, see Permanent Court of International Justice, Lotus case (*France v. Turkey*) 1927, P.C.I.J. (ser. A) No. 10. That case also in several key passages refers to relevant valid legal norms as being in the nature of "principles." The direct applicability of the principles of elementary considerations of humanity, freedom of maritime communication, and for a State not to allow knowingly its territory to be used for acts contrary to the rights of other States was stressed as the basis of decision in *The Corfu Channel case (United Kingdom v. Albania)* I.C.J. 4, para. 22 (1949). On principles of [municipal]law in the Statute of the I.C.J., see I.C.J. Statute, art. 38, para. 1(c); note BIN CHENG, *GENERAL PRINCIPLES OF LAW—AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 23-25 (1987), where principles are said to include maxims of domestic law.

For a good summary of the variety of legal norms and the acceptability of broad concepts, see OBED ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 32, n.10 (1966) (citing *inter alia*, Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475 (1933) and Separate Opinion of Judge Jessup in *South West Africa Cases (Advisory Opinion)* I.C.J. Rep. at 428-29 (1962)).

with the freely expressed wishes of the peoples concerned; Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them. . .¹²⁴

In surveying the doctrine, it must be noted that, unless the writer surveyed specifically did so, no effort is made to determine whether self-determination was discussed as a binding norm.

1. General acknowledgement

In many cases the writer generally acknowledges the relevance of the Atlantic Charter, sometimes referring to it as one of the key literary sources or as an aspect of the intellectual history of self-determination. In 1943, Hula remarked that the war was being waged by the United Nations for the liberation of the peoples conquered by Germany and Japan.

But national self-determination—in the sense in which it came to be understood during the First World War has not been proclaimed as the guiding principle of post-war reconstruction. To be sure, the Atlantic Charter has occasionally been intended as an assertion of the principle of national self-determination. Actually, however, the Charter neither contains the phrase nor suggests its meaning.¹²⁵

In 1957, James Green wrote that two of President Roosevelt's 1941 Four Freedoms, from want and fear, "were reaffirmed in the Atlantic Charter" which "also recognized the principle of self-determination . . ."¹²⁶ In 1957, Magarasevic went further, saying that the "Atlantic Charter, the [1942] Declaration of the [sic] United Nations, and the United Nations Charter represent international documents by which the right to self-determination became a positive principle of international law."¹²⁷

In 1960, while Emerson remarked that the Atlantic Charter had "paid appropriate homage to self-determination in a somewhat indirect fashion,"¹²⁸ Lachs thought that World War II became a war of liberation, not

124. Atlantic Charter, Aug. 14, 1941, annexed to Declaration by United National, Jan. 1, 1942, 55 Stat. 1603, E.A.S. No. 236, 204 L.N.T.S. 382.

125. Erich Hula, *National Self-Determination Reconsidered*, 10 SOC. RES. 1-21 (Feb. 1943).

126. James Green, *Expanding International Concern with Human Rights*, in ASHER, *supra* note 10, at 643, 653-54. Green had previously done extensive work on the Atlantic Charter in the context of post-war planning, at the U.S. Department of State. This work is referred to in Part VI of this article.

127. Magarasevic, *supra* note 44, at 31. The correct title of the 1942 instrument was "Declaration by United Nations."

128. RUPERT EMERSON, *FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES* 296 (1960).

only "for the subjugated nations of Europe but also for those of Asia and Africa. This found expression in the pronouncements and documents of the Allied Powers from the Atlantic Charter to the Charter of San Francisco."¹²⁹

The next year, Peeters, in an essay on "autodetermination," analyzed the Second and Third Points in what he thought was his largely unsuccessful quest for an articulated principle of self-determination applicable to the peculiar situation in Czechoslovakia and other central and eastern European countries conquered by the USSR after the end of World War II.¹³⁰

Both Johnson, in 1967, and Green, in 1970, mentioned the Atlantic Charter references and Prime Minister Churchill's later efforts to qualify its application to the British Empire.¹³¹ In his 1971 separate opinion, Judge Amoun referred to it as one of the "historic declarations" reflecting "the fight of peoples for freedom and independence."¹³² In 1973, Brownlie noted that "[a]lthough reference is often made to . . . the Atlantic Charter . . . the key development was the appearances of references [to self-determination] . . . in . . . the United Nations Charter."¹³³ In 1974, Tunkin, the Soviet jurist, noted his government's September 1941, "agreement with the basic principles of the Atlantic Charter"¹³⁴ and simultaneous critique of its "vague and diffuse formulas"¹³⁵ on self-determination.

On the other hand, in 1977, Ofuatey-Kodjoe noted that self-determination was considered by the allied powers as such an imperative principle of political action that, even with its difficulties, it emerged in the Atlantic Charter and finally, in the U.N. Charter. However, according to Buchheit's 1978 reading of the historical facts, Churchill's alleged exclusion of the colonial territories was "secured over Roosevelt's protest."¹³⁶ In 1981, Cristescu notes that the Atlantic Charter and other important wartime instruments "had some influence on the [self-determination] work of the San Francisco Conference," and in 1985 Thürer partly agrees.¹³⁷ As we reach 1990, we see Cassese repeating much of what Johnson and Green had said

129. Lachs, *supra* note 47, at 42.

130. Peeters, *The Right of Nations to Autodetermination*, III WORLD JUSTICE 147, 169-71 (1961).

131. JOHNSON, *supra* note 20, at 34-35; Green, *supra* note 62. To the same effect, see Robert Friedlander, *Self-Determination: A Legal Political Inquiry*, in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS 307, 318 (Yonah Alexander & Robert Friedlander eds., 1980).

132. Amoun, *Sep. Op. in Namibia*, *supra* note 4, at 72-73. He said that the fight, not the instruments, contributed to customary law.

133. BROWNLIE, *supra* note 66, at 576. Menon also mentions it. Menon, *supra* note 80.

134. GRIGORII I. TUNKIN, *THEORY OF INTERNATIONAL LAW* 61-62 (1974).

135. *Id.* at 62.

136. OFUATEY-KODJOE, *supra* note 25, at 96; BUCHHEIT, *supra* note 20, at 117 (citing M.S. Venkataramani, *The United States, The Colonial Issue and the Atlantic Charter Hoax*, 13 INT'L STUD. 1 (1974)).

137. CRISTESCU, *supra* note 16, at 93. Thürer, *supra* note 95, at 471. He thinks that the Charter's influence was considerable.

earlier, though he also considers that the war was drawing to a close in 1941 and thinks that the principle of self-determination was “upheld in a mild form” in the Atlantic Charter of that year.¹³⁸

2. The intended source of universal self-determination claims

A few early writers argued that the Atlantic Charter was the valid source of claims to self-determination. These included Meyer who, in 1946, argued that in the process of drawing post-war territorial boundaries, self-determination, covered by the Second Point, should be scrupulously applied. He pointed out the Soviet Government was not applying self-determination in the Baltics or anywhere else. It should not be regarded as a phantom principle to be invalidated due to such practical objections as that “Balkanization” was a consequence of its application. Its main exception consisted of “uncivilized Tribes [as in] Central Africa or the South Sea,”¹³⁹ *i.e.* it referred almost exclusively to European territories. A more muted reference to the Atlantic Charter was made by Walworth Barbour, U.S. Deputy Assistant Secretary of State for European Affairs, in an October, 1954 address on The Concept of Self-Determination in American Thought. He noted that:

The central theme of freedom in the American approach to the world was reiterated by President Roosevelt in the Four Freedoms speech of 1941 . . .

[That] heritage . . . [had] made itself felt more recently in . . . the Atlantic Charter, the United Nations Charter, and . . . the [1954] Pacific Charter . . .¹⁴⁰

A stronger acknowledgement was made by Rousseau in his textbook on international law, where he described a radical transformation of juridical

138. CASSESE, *supra* note 111, at 132; Heinz Klug, *Self-Determination and the Struggle Against Apartheid*, 8 WIS. INT'L L.J. 251, 259 (1990).

139. Meyer, *National Self-Determination—Forgotten and Remembered*, AM. J. ECON. & SOC. 449-50 (1945-46). He distinguished the Third Point, which dealt with internal self-government. Meyer was a visiting political science professor at Bucknell. He had a doctor of jurisprudence degree and had been a German diplomat.

140. Walworth Barbour, Address before the Fifth Congress of the International Peasant Union, New York, DEP'T ST. BULL., Oct. 3, 1954, at 576-77. An opinion comparable to Meyer's and possibly Barbour's was expressed by Fenwick, the distinguished American international lawyer, in his 1948 text on international law: “The incorporation of the Charter in the Declaration by United Nations . . . gave to the principle an international character. Query, whether the acquisition of territory by the Soviet Union, by Poland . . ., by Yugoslavia, and by France in the several treaties of peace can be brought within the principle of ‘no aggrandizement?’” CHARLES G. FENWICK, INTERNATIONAL LAW 361 (3d ed. 1948). The Atlantic Charter and Declaration by United Nations (containing an Appendix with the Atlantic Charter) are reproduced as appendices. The same passage was repeated in 1965. CHARLIE G. FENWICK, INTERNATIONAL LAW 426 (4th ed. 1965). However, there is now added to the end of the first sentence: “and the Charter of the [U.N.] closed the issue by declaring as one of its principles that ‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.’”

conceptions. The principle of self-determination was one of political redistribution which was consecrated by the Second Point of the Atlantic Charter.¹⁴¹

3. Applied as a source of universal self-determination claims

Regardless of what might have been in the text of the Atlantic Charter or the minds of the promulgating governments, several writers have stressed that the Atlantic Charter was, in fact, given concrete wartime application by the United States in situations calling for self-determination. The earliest writer surveyed was Ralph Bunche, a U.S. State Department official who played a leading role in drawing-up the U.N. Charter provisions on non-self-governing territories. In 1946, he wrote that the U.S. initiative on the trusteeship issue "was a logical outgrowth of the American role in the formulation of the Atlantic Charter, the provisions of which, incorporated in the [1942] United Nations Declaration, became the basic statement of the war aims of the United Nations . . ." ¹⁴² In 1972, Umozurike described how the State Department dealt with the issue of the Atlantic Charter's provision on self-determination, which culminated in the U.N. Charter.¹⁴³ In his 1973 article, Sinha discussed, *inter alia*, how the "reconstitution of independence for states which had existed at the beginning of the war"¹⁴⁴ had occurred pursuant to the Third Point. However, while Sinha seemed to think that decolonization was a post-war U.N.-related phenomenon, Ofuatey-Kodjoe's 1977 book took the position that although solving, through plebiscites, the problems of national groups in eastern Europe was in the minds of the parties, wartime self-determination discussions shifted to the "problem of dealing with overseas territorial possessions."¹⁴⁵

Current writers include Thürer, who notes the considerable influence of the Charter on the self-determination work of the San Francisco Conference, and Hills, who implies that the desires of certain members of Congress to annex the Japanese Pacific mandates were restrained by appeals to the Atlantic Charter and notes that instead they accepted strategic trusteeship.¹⁴⁶

141. CHARLES ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 81 (1953) (quoting SHUKRI, *supra* note 20, at 334-35).

142. Ralph Bunche, *Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations*, DEP'T ST. BULL., 1946, at 1037, 1043-44. For the various wartime conferences and other activities which he discusses, see *infra* text accompanying Part VI.

143. UMOZURIKE, *supra* note 16, at 59-64.

144. Sinha, *supra* note 29.

145. OFUATEY-KUDJOE, *supra* note 25, at 97-104, 125.

146. Thürer, *supra* note 95, at 471; Howard L. Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 589 & 591 (1984).

E. The Value Basis of the Norm

Logically, some of the concerns about the existence and legal status of a norm might be alleviated by formulations from its more specific to its most generic formulations *i.e.* to the level of the underlying values.¹⁴⁷ In the realm of self-determination, such an approach might be worthy of consideration in view of the vast expansion of territory claimed by self-determination's advocates, especially at the United Nations. That territory is now said to include, in addition to colonialism and racism,¹⁴⁸ the right of self-determination entities (peoples) to (1) enhance their economic and social welfare and development, especially through formal and substantive equality, as exemplified by the New International Economic Order, (2) safeguard and improve their cultural identities and (3) procure material assistance, including military aid, to establish and/or strengthen national liberation movements or newly-emancipated polities.¹⁴⁹ Yet, as will now be shown, discussions of the possible value system of self-determination have not been so always so patent.

1. Friendly relations, peace and cooperation

Both places in the U.N. Charter where the phrase "self-determination" appears, also refers to "friendly relations" and "peace," to be implemented by the U.N.'s Principles in Article 2. It was therefore without demur that self-determination was included among the principles of international law on which the Friendly Relations Declaration elaborates, along with co-operation among States.¹⁵⁰ One is therefore not surprised to see repeated doctrinal discussions in which it is clear that self-determination is evidently considered to be closely related to friendly relations, peace and cooperation. It is quite possible to argue that a value base is located somewhere in those notions. However, that has not been fully articulated.

147. This approach to international legal reasoning has become more prevalent in recent years, as states, international organizations and jurists seek to clothe with tangible meaning international instruments such as treaties (especially the constitutions of international organizations), and as the international legal system concerns itself with the activities of non-states (especially individuals) and such unprecedented topics as nature and the human environment. Early exponents of value-oriented jurisprudence include Wilfred Jenks and Myers McDougal and his associates. For a recent exposition of the latter approach, see LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE (1989). See also Laing, *supra* note 123, at 748-50.

148. Pomerance expresses extreme disquiet over the common tendency within U.N. circles to describe the latter as an inherent component of the former, or vice versa. POMERANCE, *supra* note 106, at 37-41.

149. See CRISTESCU, *supra* note 16, chs. V-VII and IX (esp. paras. 714-29).

150. See *supra* note 32.

2. Human rights

Some writers say that self-determination has an internal and an external manifestation. The former is said to consist of the freedom of individuals within a nation to select a government of their choice; this is often thought to be the concern of the first part of the Third Point of the Atlantic Charter. The latter connotes freedom of the people, as a nation, to act as an autonomous collectivity,¹⁵¹ this is often thought to be the concern of the second part of the Atlantic Charter's Third Point.

A few writers surveyed seem to subscribe to the view that the post-1945 articulation of the self-determination norm by necessity includes the first connotation. We will see that for some that concept has human rights attributes. This is understandable, in view of Resolution 1514(XV)'s declaration that alien subjugation, domination and exploitation ". . . constitutes a denial of fundamental human rights. . ." ¹⁵² and in view of and the inclusion of self-determination in the International Covenants on human rights. A relatively early writer to suggest the linkage was Higgins, who wrote about self-determination including universal suffrage, although that did not necessarily involve the adoption of the Western system of parliamentary democracy, including the *a priori* right of the majority to constitute the government.¹⁵³

However, in 1965 Shukri took issue with this approach. While he said that self-determination included the right to choose the form of government, he seemed to read into Higgins' position the view that popular democracy was an essential attribute of internal self-determination and argued that, in reality there was a prevalence of anti-democratic regimes among the states then helping to draft the International Covenants. He also stressed the U.N. Charter's broad proscription of intervention in Article 2(7).¹⁵⁴ Three years later, Bos denied that self-determination was a human right, asserting that for purposes of social techniques, the state and the international community should be considered to be as real as the human individual.¹⁵⁵

This is probably consistent with Resolution 1541(XV) which, as Rigo Sureda pointed out, requires experience in self-government only in the case of integration, but not in the case of free association with an independent

151. See JOHNSON, *supra* note 20, at 28.

152. See para. 1 of the Resolution 1514(XV), The Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* note 21.

153. HIGGINS, *supra* note 16, at 105.

154. SHUKRI, *supra* note 20, at 294-300.

155. *Id.* Shukri accepted the one-man-one-vote principle, but said that the U.N. has judged the validity of democratic channels by the objectives achieved and had not ruled out revolutions. *Id.* at 337-38.

state.¹⁵⁶ By and large, therefore, there are generally only passing endorsements in the doctrine that the concept embraces internal self-determination. One example is Sinha's view that there might be a larger context for self-determination than decolonization since "the fundamental ideal . . . [of] the principle of self-determination . . . [is] justice for the individual in the sense that the scope of his participation in value choices be made as large as possible."¹⁵⁷

Two recent writers surveyed seem to express an unqualified acceptance of internal self-determination. The first is Pomerance, who also happens to have a strong animadversion to the U.N. "law" of self-determination. She argues that self-determination should be approached through a truly democratic perspective, since it embodies the quintessential democratic idea of the consent of the governed. Yet the "New U.N. Law of Self-Determination" fails signally to fulfil those requirements.¹⁵⁸ The other writer is De Lupis, who notes that self-government is emerging as a new rule and it will gradually crystallize to oblige states to respect the political rights of citizens.

She suggests that the human right "to elect a representative government, that is the right of peoples to majority rule—is emerging as such a fundamental right."¹⁵⁹

The much more common usage of self-determination as a human right is the treatment as a collective right inhering in the entire self-determination unit. Thus, in 1945, U.S. Secretary of State Stettinius described the new U.N. trusteeship system as one to "foster . . . the realization of human rights . . . including the right to independence or another form of self-government."¹⁶⁰ Similar views about the general right of self-determination have been expressed by several writers.¹⁶¹

156. SUREDA, *supra* note 16, at 228. On a possibly related note, he said that Resolution 1514(XV) rejects inadequacy of political, social or educational preparedness as "a pretext for delaying independence" *Id.* at 263. Recently, Crawford has reasserted the entitlement to one-man-one-vote of the inhabitants of self-determination entities not already states, claiming that the right of choice of political organization derives from its close connection with fundamental human rights. CRAWFORD, *supra* note 89, at 101-02. *See also* Friedlander, *supra* note 131, at 321 (stating that self-determination as a fundamental human right is a questionable doctrine). De Visscher asserted that "a confusion of values" to place self-determination in the draft International Covenants, since self-determination, not of the same order and, he seems to suggest, not enforceable. DE VISSCHER, *supra* note 60, at 132-33.

157. *See generally* Sinha, *supra* note 29.

158. POMERANCE, *supra* note 106, at 73.

159. INGRID DE LUPIS, *INTERNATIONAL LAW AND THE INDEPENDENT STATE* 14 (2d ed. 1987).

160. Bunche, *supra* note 142, at 1044.

161. Magarasevic, *supra* note 44, at 31; Lauterpacht, *supra* note 48, at 272. "[T]he majority will must prevail "though" the minority must not be abused;" the I.C.J. in Western Sahara case, *supra* note 6, at 100. "Nothing could more clearly show the will for emancipation than the struggle undertaken in common, with the risks and immense sacrifices it entails. This struggle is more decisive than a referendum, being absolutely sincere and authentic. . . . It is . . . that thousand-year struggle which has established the right of peoples to decide their own fate, a right which jurists, statesmen, constitutions and declarations, and the United Nations Charter, have merely recognized and solemnly proclaimed." CRAWFORD, *supra* note 89, at 362 (noting that

Human rights, therefore, play only a limited role in doctrine about the norm of self-determination. In 1973, Rigo Sureda noted the absence of a matching of the development of self-determination as a collective right with self-determination as an individual right, which is how self-determination originated.¹⁶² Thürer proposes, *de lege ferenda*, that if self-determination is to become a truly universal principle it should be developed in the sense of a continuing process of self-government, including democratic government and the protection of ethnic minorities within existing states.¹⁶³ Two solutions in the literature are noteworthy, Bos' notion that an expansion of the scope self-determination would have to be through some form of natural law, and Blay's suggestion that where "cultural distinction is used as a basis for human rights violations against a group," self-determination "could serve as a remedial right to safeguard the human rights of the claimant group."¹⁶⁴ In each case, the test being the gravity and extent of violations.¹⁶⁵ Nevertheless, on this topic of a possible human rights value basis, and related questions, doctrine is inconclusive.

3. The sovereignty-hiatus paradigm

Several writers have acknowledged that customary international law recognizes as a specific factual instance of ground for self-determination what

the lack of a universal participatory democracy was the reason for the U.N.'s non-acceptance of Southern Rhodesia's claimed autonomy under British constitutional law); CHEN, *supra* note 147, at 210. Self-determination is an expression of human dignity, the likelihood of attainment for which for the group and larger communities is the test for whether self determination should be granted; *see also* Lung-chu Chen, *Self Determination: An Imported Dimension of the Demand for Freedom*, AM. SOC. INT'L L. 88-94 (1981); OFUATEY-KUDJOE, *supra* note 25, at 155-56 (according to State and U.N. practice, applies in situations of deprivation or subjugation). *See generally* CRISTESCU, *supra* note 16, at 27, 46 (a community and collective right); ESPIELL, *supra* note 29, at 10, 66; Dinstein, *supra* note 83, at 125.

162. Thürer, *supra* note 95, at 473. *See generally* Dinstein, *supra* note 83; Yoram Dinstein, *Self-Determination and the Middle East Conflict*, in SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL, *supra* note 131, at 243.

163. SUREDA, *supra* note 16, at 355.

164. Bos, *supra* note 57, at 475; S. Blay, *Self-Determination in Cyprus: The New Dimensions of an Old Conflict*, 10 AUSTR. Y.B. INT'L. L. 67, 100 (1987).

165. For similar ideas relating to the secession of East Pakistan, (Bangladesh) *see* Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972). *See also infra* note 182. The situation described in the text was apparently hypothetically acknowledged as juridically tenable by both the Committee of Jurists and the Commission of Inquiry of the League of Nations in the Aaland Islands. *See* SUREDA, *supra* note 16, at 32-33 (citing L.N.O.J., Supp., No. 3, Oct. 1920 and League of Nations Council Doc. B.7.21/68/106 ("Abuse of sovereign power to the detriment of a section of the population" or lack of will or power to enact and apply guarantees for a minority)). It may be possible, too, to rationalize the Namibia opinion as also exemplifying this situation discussed in the text since a partial premise of the Court's reasoning is a material breach of (1) the League of Nations Mandate by South Africa, through its policy of apartheid and (2) non-observance of its obligations under the U.N. Charter to observe and respect human rights and fundamental freedoms. *See* Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WISC. INT'L L.J. 51, 96-99 (1988).

we would call the sovereignty-hiatus paradigm. Its brief formulation by Thürer is "the principle of self-determination might be considered to apply where the existence and extension of territorial sovereignty is altogether uncertain (e.g. Palestine) . . ." ¹⁶⁶ Crawford refers to aspects of the same phenomenon with his "possible categories of self-determination units [one of which is] entities part of a metropolitan State but which have been governed in such a way as to make them in effect non-self-governing territories or, in other terms, territories subject to a '*veritable carence de souveraineté*.'" ¹⁶⁷

The best-known case which is said to illustrate this application of the principle of self-determination, is that of the Aaland Islands in 1920. The islands were administratively an integral part of Finland, though culturally Swedish, as was an adjacent part of mainland Finland. There prevailed on the islands a very troubled politico-military situation contributing to local claims for union with Sweden and erosion of Finnish authority. ¹⁶⁸

The Committee of Jurists, advising the League of Nations on whether it had jurisdiction to discuss the matter, seemed to think that the situation was one in which there was a transition between an outgoing sovereign and a putative incoming sovereign. It implied that the situation was probably one in which attributes of Finnish sovereignty were lacking, since, generally speaking, such attributes only applied to a nation which was definitively a sovereign State and an independent member of the international community. It advised that if the essential basis of territorial sovereignty was lacking either because the State was not fully formed or because it is undergoing transformation or dissolution, the situation was obscure and uncertain from a legal point of view and pending the completion of the the period of development establishment of a definite situation, which was normal in respect to territorial

166. Thürer, *supra* note 95, at 473.

167. CRAWFORD, *supra* note 89, at 100. *See also id.* at 86-87.

168. As Rigo Sureda summarizes, the islands, along with Finland,

had been ceded by Sweden to . . . Russia . . . in 1809. When Finland proclaimed itself independent in 1917 the islanders, of whom 92.2% were of Swedish origin—expressed the wish to join Sweden and asked Sweden to back their claim. Sweden tried to persuade Finland to hold a plebiscite in the islands, but Finland refused to undertake such an action. The situation grew tense when Finland sent troops to the islands and arrested on charges of treason the leaders . . . At this stage of the dispute the United Kingdom, fearing that the situation could deteriorate so as to threaten peace in the Baltic, brought the . . . question before the Council of the League. . . .

The Council appointed a Committee of Jurists which made certain recommended that the matter was not exclusively within the domestic jurisdiction of Finland and beyond the League's cognizance. SUREDA, *supra* note 16, at 29-32 (quoting L.N.O.J., Supp. No. 3, Oct. 1920). *See also* UMOZURIKE, *supra* note 16, at 180-81. It will be noted that Finland's own independence was somewhat in doubt, especially since its recognition by the Great Powers was lacking, in some cases, and qualified, in others. *See* L.N.O.J. Supp. No. 3, Oct. 1920, at 7-9. Later on, the League re-submitted the matter to a Commission of Inquiry which, disagreeing with the Jurists, on purely factual grounds found that the League had no jurisdiction. SUREDA, *supra* note 16, at 32-33 (citing League Council Document B.7.21/68/106).

sovereignty the principle of self-determination may be called into play. Thus, it thought the ground might be laid for League jurisdiction in the matter concerning the disposition of territorial sovereignty on account of the absence of a definite established political situation. As the Committee stated, "[t]ransition from a *de facto* situation to a normal situation *de jure* cannot be considered as one confined entirely within the jurisdiction of a state."¹⁶⁹

As recently noted by Berman, Judge McNair had in mind this factual and juridical paradigm in his separate opinion in the 1950 *South West Africa* case. The existence of the League of Nations had ceased and, with it, the existence of Article 22 of the Covenant, providing for South Africa's administration, under League supervision, of the Mandate over South West Africa. Precisely on account of this transitional nature of the situation, Judge McNair backed the Court's conclusions that South Africa had not supplanted the League's ultimate competence, by stressing that Article 22 had an objective of real and continuing character, transcending the demise of the League. The essence of the situation, according to Judge McNair, was the fact that "sovereignty [was] in abeyance,"¹⁷⁰ a situation analogous to that of the common law trust.¹⁷¹

A somewhat analogous situation is provided by the *Western Sahara* case, in which the ICJ sought to determine whether at the time of colonization by Spain, in the 1880s, the Spanish Sahara was *terra nullius* and, if not, what legal ties existed between the territory and Morocco and Mauritania, which both claimed the territory. In that case, the ICJ explicitly held that no ties of territorial sovereignty existed between the territory and either Morocco or the Mauritanian entity. Since that was so, the U.N. principle of self-determination applied.¹⁷² However, putative sovereignty or claim continued, hence the situation is distinguishable from those in the *Aaland Islands* and *South West Africa* cases.

Thus, it has been said that the essence of this paradigm is the extance of a transition from facts to law.¹⁷³ One might rephrase the paradigm as being that before international law will accord cognizance of an incipient self-determination situation in a case of alleged *carance*, there must be such

169. L.N.O.J., Supp. No. 3, Oct. 1920, at 6.

170. International Status of South West Africa, (Advisory Opinion) Separate Opinion of Judge McNair, I.C.J. Rep. 150 (1950). Berman, *supra* note 165, at 75. See generally *id.* at 72-77. South Africa as Mandatory Power had ceased to submit reports on South West Africa to the U.N. Trusteeship Council, which had assumed responsibilities formerly vested in the League under Article 22 of the League of Nations Covenant. The Court advised the General Assembly that (1) South Africa continued to have international obligations under the Mandate including that of submitting to U.N.'s supervisory function, (2) Chapter XII of the U.N. Charter was applicable to South West Africa, though South Africa had no legal obligation to place the territory under the trusteeship system, and (3) South Africa had no competence to modify the international status of South West Africa.

171. *Id.*

172. *Western Sahara*, (Advisory Opinion), I.C.J. Rep. (1975). For a general discussion see Berman, *supra* note 165, at 99-103.

173. Berman, *supra* note 165, at 75. See generally *id.* at 72-77.

a disruption of sovereignty as to constitute a hiatus between a formerly complete organism with legal personality, where facts are wedded to law, and another possible, but not yet incipient, future legal person. The only difficulty is that while the logic of the Aaland Islands paradigm is very appealing, firm authority based on the formal sources of international law is scant. It must be concluded that doctrine has not identified adequately reasoned or authorized value bases for the norm of self-determination.

F. Same Scope Questions

1. Only colonial and trust territories?

Without a clear value basis, questions of the scope of self-determination are somewhat unsettled. Since for a number of writers the norm of self-determination, even if universal in application, is derived from U.N. sources, it is not surprising that they have limited its scope to those colonial and trust territories which existed in 1945. Those writers include Shukri, Rigo Sureda and Gros Espeill.¹⁷⁴ Rigo Sureda's discussion was the fullest, much of his monograph covering U.N. case-histories. He noted that U.N. application of Charter Article 1(2) had been limited to colonial situations. This was also the case with the texts of, and U.N. practice under Resolution 1514(XV), Resolution 1541(XV), the International Covenants and the Friendly Relations Declaration. According to him, the exceptions included territories occupied by Israel and South Africa.¹⁷⁵

Within the United Nations, there have been significant efforts to expand the scope. Thus, between 1952 and 1954, Belgium unsuccessfully sought to deflect attention under Chapter XI from colonial territories to those parts of the "metropolis inhabited by peoples whose degree of actual subordination to the rest of the state community in the midst of which they lived placed them in a colonial situation."¹⁷⁶

Those peoples included homogeneous disenfranchised "peoples differing from the rest of the population in race, language, and culture," such as the Kurds, Azerbaijanis, and the Nagas.¹⁷⁷ And in 1961, the United States, pointing its finger at the Soviet bloc, complained in the Fourth Committee about the non-application of paragraph 1 of Resolution 1514(XV) to "peoples subjugated by others of the same race."¹⁷⁸

174. SHUKRI, *supra* note 20, at 336-37; ESPIELL, *supra* note 29, at 8 (colonial and alien domination); SUREDA, *supra* note 16, at 101-11.

175. SUREDA, *supra* note 16, at 101-11.

176. *Id.* at 103.

177. *Id.* (quoting U.N. GAOR, 9th Sess., 419 mtg. para. 20).

178. SUREDA, *supra* note 16, at 103, 106. Note also the comment of Deputy U.S. Secretary of State Murphy in a public address in November 1955, that "the problem of self-determination is not exclusively a colonial problem, for we believe that the application of the principle should not be limited to the colonial territories but should be universal in scope and should apply just as much to territories within the Soviet orbit in Europe and Asia which have been denied the full

However, some writers have advocated broader concepts. They have included Ofuatey-Kudjoe, who pointed out that self-determination, like “many principles of international law, such as the principle of non intervention, the right of self-defense, and others [were] formulated in general terms so that their particular manifestation . . . [varied] in accordance with the situation to which they [were] applied . . .”¹⁷⁹ By necessity, this group includes those writers who have argued for self-determination in situations of extreme deprivation of human rights. Also noteworthy is Crawford’s list of “self-determination units,” which included

(Possibly) . . . territories forming distinct political-geographical areas, whose inhabitants do not share in the government either of the region or of the State to which the region belongs . . . , [and] All other territories or situations . . . to which self-determination is applied by the parties as an appropriate solution or criterion.¹⁸⁰

In conclusion, it might be noted that Pomerance’s criticisms of contradictoriness, inconsistency and imprecision of the criteria and their practical application appear to be on target.¹⁸¹

2. Secession

Given the position just described, it is not surprising that such U.N. texts as paragraph 7 of the Self-Determination section of the Friendly Relations Declaration provides that “[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign or independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and has possessed a government representing the whole people belonging to the territory without distinction as to race creed or colour.”¹⁸² Furthermore, some have thought that the unanimous institutional view at the U.N. rules out the possibility of secession in situations other than those described in the immediately

exercise of self-determination. . . .” Murphy, Address before a Conference on Africa and Asia in the World Community, Catholic Association for International Peace, DEP’T ST. BULL., 1955, at 889, 894.

179. OFUATEY-KUDJOE, *supra* note 25, at 150.

180. CRAWFORD, *supra* note 89, at 101.

181. POMERANCE, *supra* note 106, at 14-23.

182. Friendly Relations Declaration, *supra* note 32. The careful language was procured by Canada [presumably wishing to safeguard its domestic situation]. WILLIAMS & DE MESTRAL, *supra* note 92, at 48-49; J. CASTEL, INTERNATIONAL LAW—CHIEFLY AS APPLIED IN CANADA 91-92 (3d ed. 1981).

preceding sub-section of this article.¹⁸³ Several writers have argued against a right of secession. One who deserves to be quoted is Green, who trenchantly remarked:

It can hardly be contended that excessive concern was shown for the principle of self-determination or its application in such instances as the division of the founder Member India into India and Pakistan; the union of two independent Members, Syria and Egypt, as the newly-created United Arab Republic; the absorption of West Irian by Indonesia, which had itself "evolved" from the United States of Indonesia into the Republic of Indonesia, regardless of the rights of, for example, the Ambonese or the south Moluccans; Biafra and Bangladesh or the disappearance of certain British protectorates and their fusion with newly-established Commonwealth countries, regardless of the fact that the local inhabitants might have preferred to resume that independence rather than become a minority group governed by a rival tribe.¹⁸⁴

However, at least one writer interpreted the Helsinki Declaration's endorsement of self-determination as making the right available to all peoples who have lost their political independence through force or who were separated against their will. These included the peoples of the Baltics.¹⁸⁵

Nevertheless, as long ago as 1953, Eagleton went further, questioning the limitation of self-determination to the colonies if self-determination was a fundamental human right, as its inclusion in the International Covenants seemed to indicate. Hannum thinks that "developing concepts of human rights, minority rights, and indigenous rights may contribute directly to strengthening the principle of self determination, even as a state-developed

183. See generally BUCHHEIT, *supra* note 20, at 83-94. He thought that the declaration banished delegitimization of secession where the coercive force of international opinion is insufficient to moderate a state's internal policies. *Id.* at 97. See also, Thüerer, *supra* note 95, at 474; HANNUM, *supra* note 1, at 49. It has been suggested that the text of Article 1 of the International Covenants (*supra* note 20) and their preparatory work support the view that they reach beyond the colonial situation, but that there are indications of narrower views: Thornberry, *supra* note 20, at 878.

184. See generally Green, *supra* note 62. Fitzmaurice, *supra* note 68, at 234, argued that, in the broad context of secession, self-determination was applied in a contradictory and discriminatory way. Note also Emerson's often quoted remark that "All peoples do not have the right to self-determination; they never had it and they never will have it." He also said that an excellent, irrefutable case could be made for the proposition that order and stability could be achieved only if self-determination was limited to the first round of the setting-up of States in a closely-defined situation. Rupert Emerson, *Self-Determination*, 60 AM. SOC. INT'L L. 135, 136-37 (1966). Gros Espeill denied that the right lapses after its first exercise: ESPEILL, *supra* note 29, at 8. However, he denied the existence of the right of secession from an existing U.N. Member, *id.* at 13. See also Thüerer, *supra* note 95, at 474.

185. See generally Meissner, *supra* note 94.

law is seeking to minimize its post-colonial impact.”¹⁸⁶ And Chen predicts that, in the future, there will be application of self-determination in secession situations to judge whether granting or rejecting the demands a group will move the situation closer to global values of human dignity.¹⁸⁷

Going further, on general principle Wright advocated a right to secession of all peoples, not only those who lived in colonies or protectorates separated by salt water from the metropolis,¹⁸⁸ while Shukri ended his book by suggesting the importance of reconsidering self-determination so as to make its application truly universal.¹⁸⁹ And Ofuatey-Kudjoe posited out that self-determination was logically applicable in non-colonial situations.¹⁹⁰ It was due only to political circumstances prevailing in U.N. practice that it was not applied in those situations.¹⁹¹ Clearly, however, the issue of secession is not free from doubt.

3. *Jus Cogens*

Finally, we review juristic opinion on the question of whether or not the norm of self-determination is one of *jus cogens*, *i.e.*, peremptory and non-derogable. It is, of course, well-known that there are few generally-accepted examples of *jus cogens*, hence it is not surprising that there is not an abundance of unqualified assertions that self-determination is included. This group of writers includes Richardson, a Yale student note and Cassese.¹⁹²

In a group of jurists making qualified assertions, one might include the 1966 Report on the law of treaties by the International Law Commission, where some members are cited as acknowledging self-determination as a possible *jus cogens* norm.¹⁹³

Brownlie pointed out in 1973 and 1979, that he was “referring to candidate rules and use[d] tentative language . . .”¹⁹⁴ However in 1990, he deleted this footnote caveat and thus strengthened the textual statement “other rules which *probably* have this special status include . . . the principle

186. Eagleton, *supra* note 39, at 597; HANNUM, *supra* note 1, at 49.

187. Chen, *supra* note 161, at 91-92. In 1972 Nanda suggested that there were several bases for self-determination of East Pakistan. These included deprivation of human rights of the inhabitants—a majority of Pakistanis, by the use of excessive force, “genocide” and selective genocide. Other factors included forcible deprivation of the determination, by majority vote, of political direction of the country: Nanda, *supra* note 165, at 336.

188. Wright, *supra* note 38, at 30.

189. See SHUKRI, *supra* note 20, at 336.

190. OFUATEY-KODJOE, *supra* note 25, at 127-28.

191. *Id.* at 128.

192. Henry J. Richardson, III *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185, 190 (1978); Note, *The Logic of Secession*, 89 YALE L.J. 802, 806 (1980); CASSESE, *supra* note 111, at 136-37.

193. See generally BROWNLIE, *supra* note 1.

194. BROWNLIE, *supra* note 66, at 500; BROWNLIE, *supra* note 88, at 513.

of self-determination."¹⁹⁵ In his 1980 U.N. report, Gros Espeill admits that the proposition does not yet command unanimous acceptance, noting that even Cristescu's U.N. report does not advocate it, and that the Friendly Relations Declaration includes heterogeneous desiderata, all of which are not *jus cogens*. At one point he seems to be describing a situation of *lex lata*, saying that the principle had been "transformed . . . , since 1960, into a basic principle, of universal applicability, into a right of all peoples and into a peremptory norm . . ."¹⁹⁶ However, he later admits that it is his personal view that self-determination is *jus cogens*. Nevertheless, he candidly acknowledges his inability to conceal his theoretical viewpoint that the basis and "*raison d'être* of a *jus cogens* [proposition] is . . . natural law."¹⁹⁷

Several writers seem to imply that self-determination might be a *jus cogens* norm of limited scope. This might be implicit in the well-known contention made by Rigo Sureda, that the title to colonial territory held by a colonial power is invalid. The same might be the case with Shaw's proposition that it is difficult to conceive that a treaty could be upheld as valid if it provided the continuation of a colonial relation against the wishes of the inhabitants of the territory.¹⁹⁸

Those who have denied that the self-determination norm could be preemptory include Blum, Cristescu and Pomerance, who level somewhat pointed criticism at Gros Espeill, notwithstanding the care with which he framed his remarks. Blum, Cristescu, and Pomerance also argue that there cannot be "*cogens*" if there is no "*jus*" and that Gros Espeill ignores the problems of the relationship between rights and the relativity of rights.¹⁹⁹

Only Buchheit tried to face up to these dilemmas, noting that the efficacy of the norms of non-intervention and the prohibition of force were "seriously impaired in circumstances involving even a colorable claim to self-determination."²⁰⁰ The only exception to this disturbing conclusion appeared to be "the rare cases where an international judgment regarding the legitimacy of a particular claim for self-determination"²⁰¹ provided a basis for criticizing intervention on behalf of the illegitimate claimant to self-determination.

195. BROWNIE, *supra* note 1, at 513 (emphasis added).

196. ESPEILL, *supra* note 29, at 8.

197. *Id.* at 13. After making the remark about natural law Gros Espeill somewhat weakly refers to the "traditional Spanish law" and "law of the Indies" doctrine that "when the law was contrary to natural law the latter applied and not the [non-natural] law." *Id.*

198. SUREDA, *supra* note 16, at 32; SHAW, *supra* note 83, at 91. In that passage Shaw also said that it was arguable that self-determination was within the category of *jus cogens*.

199. Tehuda Z. Blum, *Reflections on the Changing Concept of Self-Determination*, 10 ISRAEL L.R. 509, 511 (1976); see generally CRISTESCU, *supra* note 16, at 154. However, it should be noted that he actually says that no U.N. instrument confers a preemptory character to the right of peoples to self-determination. Cf. POMERANCE, *supra* note 106, at 70-71.

200. BUCHHEIT, *supra* note 20, at 38 (citing R.J. VINCENT, NON-INTERVENTION IN INTERNATIONAL ORDER 236 (1974) on the issue of hierarchy).

201. *Id.*

Although Western juristic opinion was “strongly against [that] calculus,”²⁰² one of its only normative-level responses had been to advocate a hierarchy among those norms, giving lowest preference to human rights, including self-determination, which were aspirational.²⁰³ However, while admitting that the relationship between those crucial norms was frighteningly obscure, he admitted that “a majority of the members of the General Assembly accept[ed] at least in colonial settings the preeminence of self-determination as an operative norm . . .”²⁰⁴ Therefore, in the attempt at removing the opened subjectivity involved in unilateral determinations of legitimacy, Buchheit advocated efforts to “delimit the scope of legitimate self-determination,”²⁰⁵ thereby reducing the number of instances of permissible deviation from the norms prescribing intervention and use of force norms.²⁰⁶

However, it is my belief that this task, and several other delimitational exercises, would be facilitated by a clearer identification of the value basis of self-determination. I will return to this after exploring the World War II origins of the modern version of the norm in the Atlantic Charter.

IV. ENTERS THE ATLANTIC CHARTER

A. Prelude: Humanitarianism in the New Deal and The Four Freedoms

The thrust of the New Deal had been humanitarian and all-embracing. Its underlying premise was that all groups in society should have, as a minimum share of the nation’s bounty, the right to the basic necessities of life. In addition, everyone had the right to be protected from exploitation in the workplace by legislation, new regulatory agencies, and social welfare programs.²⁰⁷

Furthermore, Roosevelt and the “New Dealers in [his] Administration saw [these reforms] . . . as a model for other parts of the world . . .”²⁰⁸ He first articulated them as global human rights concerns in a press conference on July 5, 1940, when he outlined his long-range peace objectives, which would include five freedoms: of information, of religion,

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See Edward A. Laing, *The Contribution of the Atlantic Charter to Human Rights Law and Humanitarian Universalism*, 26 WILLAMETTE L. REV. 113, 122 (1989) (citing WILLIAM LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 132-33, 162-65, 261-64 & 332-33 (1963)); JOHN MAJOR, *THE NEW DEAL* 72-79, 86-95 (1968); WILBUR J. COHEN, *THE MAKING OF THE NEW DEAL—THE INSIDERS SPEAK* 150-59 (Katie Louchheim ed., 1983).

208. DAVID REYNOLDS, *THE CREATION OF THE ANGLO-AMERICAN ALLIANCE 1937-41*, 252 (1981).

of expression, from fear and from want²⁰⁹—ideas which were a lifetime in gestation, foreshadowed in Roosevelt's early writings and papers.²¹⁰ In his Annual Message to Congress in January 1941, he outlined the now four freedoms: of speech and expression, of worship, from want and from fear. He stressed universality, being available everywhere and anywhere in the world and not a "vision of a distant millennium" [but] 'a definite basis for a kind of world attainable in our own time and generation.'²¹¹

There is no doubt that the Four Freedoms captured the popular imagination both in the United States and abroad. As Secretary of State Hull put it, the prevailing sentiment in the United States was that "the promotion of these human freedoms [was] . . . the basis for . . . consideration of a future world order."²¹²

B. Formulation of the Atlantic Charter Through Declaration By United Nations

The Atlantic Charter was negotiated in mid-August 1941, during conference in Newfoundland between Roosevelt and British Prime Minister Winston Churchill. At this ship-board conference, the leaders satisfied their long-standing desire to meet each other for the first time and to discuss wartime matters. One result of that discussion was a Joint Declaration of eight points, issued on August 14, 1941, in which both countries based their hopes for a better future of the world.²¹³

209. Laing, *supra* note 207, at 116, (citing ROBERT SHERWOOD, ROOSEVELT AND HOPKINS—AN INTIMATE HISTORY 226 (1964)).

210. Laing, *supra* note 207, at 116-17 (citing THOMAS GREER, WHAT ROOSEVELT THOUGHT—THE SOCIAL AND POLITICAL IDEAS OF FRANKLIN D. ROOSEVELT 12-13 (1958)).

211. Laing, *supra* note 207, at 117 (citing Annual Message to Congress by Franklin D. Roosevelt, Jan. 6, 1941, 11 PUBLIC AIMS OF THE UNITED NATIONS 663-78 (1943)); RUTH RUSSELL & JEANNETTE MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER 29 (1958).

212. CORNELL HULL, 2 THE MEMOIRS OF CORNELL HULL, 1630 (1948). For reactions see Laing, *supra* note 207, at 117-18.

213. Laing, *supra* note 207, at 118; see generally THEODORE WILSON, THE FIRST SUMMIT—ROOSEVELT AND CHURCHILL AT PLACENTIA BAY (1969).

The eight points were:

First, their countries seek no aggrandizement, territorial or other;

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned;

Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them;

Fourth, they will endeavor, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity;

Fifth, they desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security.

Sixth, after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford all nations the means of dwelling in safety within their own

There were widespread positive public reactions to the Declaration, which was immediately journalistically dubbed the Atlantic Charter, an expression adopted by the Allies. Roosevelt himself compared it to the Ten Commandments.²¹⁴

The two points directly relating to self-determination were

Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned.

Third, they respect the right of all people to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.²¹⁵

Although, on the face of the text, this language, partly based on Churchill's first draft²¹⁶ was not concerned with self-determination as discussed in this article, there is evidence that this was in the mind of Roosevelt throughout the conference. Elliott Roosevelt vividly described a conversation between Roosevelt and Churchill after dinner on August 10, 1941, when Roosevelt expressed strong views about the "development of backward countries,"²¹⁷

boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want;

Seventh, such a peace should enable all men to traverse the high seas and oceans without hindrance.

Eighth, they believe that all the nations of the world, for realistic as well as spiritual reasons must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside their frontiers, they believe, pending the establishment of a wider and more permanent system of security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

Atlantic Charter, Jan. 1, 1942, 55 Stat. 1603, E.A.S. No. 236, 264 L.N.T.S. 382. For general background, see WILSON, *supra*, ch. 1. Cf. Venkataramani, *supra* note 136, at 5-9 (discussing H.G. Welles' idea for a charter of liberties for mankind).

214. LOUISE HOLBORN, 1 WAR AND PEACE AIMS 230-31 (1943); VITAL SPEECHES 674, 676 (1942-43); Laing, *supra* note 207, at 120-21; Venkataramani, *supra* note 136, at 1-2, 13-15. See *id.* at 2-3, 4-5 for contrary views. Others compared it to the Magna Carta, *On the News Fronts of the World*, LIFE, Aug. 25, 1941, at 27. See also NICHOLAS HALASZ, ROOSEVELT THROUGH FOREIGN EYES 196-97 (1961) (reporting on foreign journalistic reactions).

215. See *supra* note 213. The first point also indirectly speaks to self-determination.

216. In his first draft of the Charter, Churchill wrote "[t]hird, they respect the right of all peoples to choose the form of Government under which they will live, they are only concerned defend the rights of freedom of speech and the thoughts without which such choice must be illusory." WILSON, *supra* note 213, at 187-88; POMERANCE, *supra* note 106. The final version of the Third Point was offered by the U.S. side. WILSON, *supra* note 213, at 190-93 (Churchill proposing the insertion of "sovereign rights"). *Id.* at 195. See generally Venkataramani, *supra* note 136, at 16-18. He thinks that "sovereign rights" were probably inserted by Churchill to underscore exclusion of countries being ruled by Western Powers. *Id.* at 18.

217. WILSON, *supra* note 213, at 122 (quoting ELLIOTT ROOSEVELT, AS HE SAW IT 36-37 (1974)).

noting that a war could not be fought "against fascist slavery"²¹⁸ if the allies "at the same time did not work to free peoples all over the world from a backward colonial policy."²¹⁹ He recalled that these, and other, remarks provoked strong responses from Churchill, but that, nevertheless, Roosevelt rejoined by threatening to withdraw American aid if Great Britain continued "to ride roughshod over colonial peoples."²²⁰

Nearly six weeks after its promulgation, the Atlantic Charter was endorsed in a resolution at a London meeting of the Inter-Allied Council of governments aligned against the German Axis, wherein the signatories signified their adherence "to the common principles of policy set forth in that declaration and their intention to cooperate to the best of their ability in giving effect to them."²²¹ However, the Soviet Government qualified its acceptance, stating that every nation has the right to "choose such a form of government as it deems opportune and necessary for the better promotion of its economic and cultural prosperity. . . ."²²² Then, in early November 1941, the International Labour Organization passed a resolution endorsing the Atlantic Charter.²²³

Its most dramatic early formal reaffirmation was the international agreement entitled the Declaration By United Nations signed by the United States, Great Britain, the Soviet Union and China, on January 1, 1942, and by twenty-two other Allied countries on January 2. A main objective of the Declaration, stated in the first preamble, was formally to reiterate the "common programme of purposes and principles . . . known as the Atlantic Charter,"²²⁴ which was appended to the text registered with the League of Nations. Each declarant's main agreement was "to employ its full resources, military or [sic] economic, against those members of the Tripartite Pact and its adherents"²²⁵ with which that declarant was at war, to cooperate with the other parties and "not to make a separate armistice or peace with the enemies . . ."²²⁶ The Declaration also served to fortify the Atlantic Charter's congruence with the human rights concerns of the Four Freedoms

218. *Id.* at 122.

219. *Id.*

220. *Id.* at 124. The details of this version of the discussion between the two leaders has been challenged by Wilson. *Id.* See also Venkataramani, *supra* note 136, at 18-19. Venkataramani also construes certain Churchill-Roosevelt correspondence to suggest that the leaders might have secretly agreed to exclude the colonies from application of the Third Point. *Id.* at 20-22.

221. DEP'T ST. BULL., Aug. 1941, at 234.

222. *Id.*

223. HOLBORN, *supra* note 214, at 5-6.

224. Atlantic Charter, *supra* note 213; Laing, *supra* note 207, at 123-24. The stated countries which signed in January were Australia, Belgium, Canada, China, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, U.S.S.R., U.K., U.S.A., and Yugoslavia.

225. Atlantic Charter, *supra* note 213.

226. *Id.*

since, over Soviet objections, Roosevelt included a preambular reference to freedom from worship, which had been omitted from the Atlantic Charter.²²⁷ By 1945, twenty-one more states had signed the Declaration, bringing the total number to forty-seven, or the preponderant majority of the world's essentially independent states. Today, these states are included in treaty lists as being parties to *both* the Atlantic Charter and Declaration By United Nations.²²⁸

The Atlantic Charter was also the subject of numerous approving resolutions of international organizations.²²⁹ It was formally reiterated in the important set of wartime "Lend-Lease" treaties, commencing with the U.K.-U.S. treaty of February 1942, establishing the pattern for numerous treaties providing for the establishment of non-discrimination and liberalism in international economic relations, long cherished by the United States and promised by the Fourth Point of the Atlantic Charter.²³⁰ It was the basis for and solemnly invoked at major wartime conferences including the first one called to implement the Atlantic Charter, the Food and Agricultural Conference of February 1943;²³¹ the Bretton Woods Conference for a World Bank and International Monetary Fund;²³² the Declaration on Liberated Europe of February 11, 1945;²³³ the U.N. Conference on International Organization (UNICO) which prepared the U.N. Charter;²³⁴ and the conferences leading to the Charter of the International Trade Organization (ITO) and the General Agreement on Tariffs and Trade

227. SHERWOOD, *supra* note 209.

228. Treaties in Force for the United States, DEP'T ST. BULL., Jan. 1, 1990; I. KAVASS & J. SPRUDZS, 2 A GUIDE TO THE U.S. TREATIES IN FORCE, 8, 53, 54 (1989).

229. E.g., Resolution XXXV of the IIIrd Meeting of Minister of Foreign Affairs of the American Republics, in PAN AM UNION, REPORT OF THE THIRD MEETING OF FOREIGN MINISTERS OF THE AMERICAN REPUBLICS, Jan. 1942, at 58); *see generally* WHITEMAN, 5 DIG. OF INT'L L. (1965). The Philadelphia Declaration was annexed to the I.L.O.'s Constitution in 1946: U.N. Yearbook, 1946-47, 661-62; Laing, *supra* note 207, at 121-22.

230. Agreement Between the Governments of the United States of America and the United Kingdom of Great Britain and Northern Ireland Respecting on the Principles Applying to Mutual Aid in the Prosecution of the War Against Aggression, Feb. 23, 1942, art. VII, 56 Stat. 1433; Laing, *supra* note 207, at 136-37, 146-48.

231. Laing, *supra* note 207, at 136-37, 147-49; RUSSELL & MUTHER, *supra* note 211, at 65-69; Final Act of Conference on Food and Agriculture, 1943, Cmd. No. 6451, *reprinted* in U.N. Conference on Food and Agriculture, 152 NATURE 67 (July 17, 1943); Brown, *The Inheritance of the United Nations*, in ASHER, *supra* note 10, at 153, 180-82.

232. Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, DEP'T ST. BULL., at 79; Brown, *supra* note 231, at 82-87; E.F. PENROSE, ECONOMIC PLANNING FOR THE PEACE 89-103 (1953).

233. WHITEMAN, *supra* note 229, at 45, 95. Signed as a part of the Yalta Agreement, by the U.K., U.S.A. and U.S.S.R. Inter alia, it said "By this Declaration we reaffirm our faith in the principles of the Atlantic Charter." Its pledges include fostering conditions "to form representative governments responsive to the will of the people in Liberated Europe."

234. Laing, *supra* note 207, at 127-28, and the references cited therein; RUSSELL & MUTHER, *supra* note 211, *passim*. Undoubtedly, the UNICO conferees, who repeatedly referred to the Atlantic Charter, in numerous contexts, regarded their deliberations and the U.N. Charter as the culmination and implementation of the Atlantic Charter.

(GATT).²³⁵ It was also invoked in at least two national constitutional provisions.²³⁶ Apparently, it was also endorsed by the League of Nations and approved by “the legislative organs of most signatory states.”²³⁷

Undoubtedly, the motivation of many in the U.S. Government was economic access for the United States, which had long been sought. Strategic considerations also loomed large.²³⁸ Roosevelt, and presumably, the rest of the Administration, saw them as being closely symbiotic, the President counseling the Head of the U.S. Delegation to the Food and Agriculture Conference that “each freedom is dependent upon the others, that freedom from fear, for example, cannot be secured without freedom from want.”²³⁹

However, the wide ranging concerns which the Allies viewed through the prism of the Atlantic Charter should not disguise the fact that the matrix in which they were working and the vital essence of the Atlantic Charter was comprehensive and universal human rights. This was due to the realization of the Allies that the war was about one thing, the rights of individuals and, reciprocally, the absolute need to reduce the preoccupation with the evils of state sovereignty, racism and nationalism which had spawned Fascism, Nazism and anti-semitism in Europe and anti-Europeanism and economic expansionism in East Asia. As James Green noted in the authoritative 1957 Brookings Institution monograph on the United Nations, “[t]he Second World War marked a turning point in the development of international concern for human rights [leading to the reaffirmation of two] of the four freedoms . . . in the Atlantic Charter . . .”²⁴⁰ The universalism of this humanitarian concern can be gleaned from the scope of these numerous public documents and utterances. It is also patent in their content, including the Atlantic Charter’s “all states, . . . all [persons], . . . all nations, . . . all the men in all the lands, . . . [and] all men.”²⁴¹ We have called this globalized concern “Humanitarian Universalism.”²⁴²

235. PENROSE, *supra* note 232, at 104-17; Laing, *supra* note 207, at 150-53 and the references cited therein.

236. Speech of Australian Attorney General, Herbert V. Evatt, *Alteration of Constitution*, 16 AUSTL. L.J. 160, 161 (1942); NICARAGUA [Constitution] art. 8, Jan. 28, 1942.

237. WILSON, *supra* note 112, at 262.

238. Ernst B. Haas, *The Attempt to Terminate Colonialism: Acceptance of the United Nations Trusteeship System*, 7 INT’L ORGANIZATIONS 1, 5 (1953).

239. Letter from Roosevelt to Judge Marvin Jones, May 14, 1943, Franklin Delano Roosevelt Library, Official File 4725-B. Roosevelt addressed the Conference in similar terms. U.N. Conference on Food and Agriculture, *supra* note 231. See also Laing, *supra* note 207, at 146-47.

240. James Green, *Expanding International Concern with Human Rights*, in ASHER, *supra* note 10, at 643, 653.

241. Atlantic Charter, *supra* note 213.

242. See generally Laing, *supra* note 207, *passim*, and numerous references, some to primary U.S. (archival) sources, documenting the diverse applications of Humanitarian Universalism; Laing, *supra* note 123, at 734-38; Haas, *supra* note 238, at 3-5, 18-20. See also Venkataramani, *supra* note 136, at 6-8 (discussing H.G. Welles’ idea about a charter of liberties

C. The "Third Aspect" of Humanitarian Universalism

As James Green correctly noted, this "current preoccupation with human rights . . . represents a new and dramatic chapter in man's unending struggle for freedom . . ." ²⁴³ There are "three aspects of liberty—civil and political rights, economic and social rights and the right of self-determination." ²⁴⁴ Regarding the last of these, in the same book Sady observed that the United States developed—"early in its relations with other nations a position in support of the aspirations of dependent peoples for self-government or independence," ²⁴⁵ which "became firmly established in the American value system . . ." ²⁴⁶ This was enhanced by the fact that the nation "although having dependent territories, did not regard itself as a colonial power." ²⁴⁷

As earlier noted this concern about self-determination was reflected in President Roosevelt's views. ²⁴⁸ Its roots lay in his broader social philosophy. There is substantial evidence that, at an early age, Roosevelt had developed some sympathy for poorer persons and nations and peoples, though in his public life, this did not begin to flower domestically until the mid-1920s. ²⁴⁹ In his first Presidential Administration, however, he took steps which seemed to demonstrate growing sensitivity to the problems of the global underclass. ²⁵⁰ On March 15, 1941, he asserted that "[t]here has never been, there isn't now, and there never will be any race of people on earth fit to serve as masters over their fellow-men . . . We believe that any nationality, no matter how small, has the inherent power to its own nationhood." ²⁵¹ During his visit to West and North Africa in January and

for mankind and other humanitarian ideas, and suggestions that a statement of war and peace aims was obligatory, circulating prior to Atlantic Charter negotiations).

243. Green, *supra* note 240, at 645.

244. *Id.* See generally Laing, *supra* note 207 (discussing aspects of civil, political, economic and social rights).

245. Sady, *supra* note 10, at 825.

246. *Id.*

247. *Id.* See also OFUATEY-KUDJOE, *supra* note 25, at 96, 99; BUCHHEIT, *supra* note 20, at 117.

248. See *supra* notes 207-14.

249. NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN—BLACK POLICIES IN THE AGE OF FDR 18-30, 36-59, 70-77, 120-56, 209-35, 267-95 (1983); DANIEL FUSFELD, THE ECONOMIC THOUGHT OF FRANKLIN DELANO ROOSEVELT AND THE ORIGINS OF THE NEW DEAL 10-11, 21 (1956); THOMAS GREER, WHAT ROOSEVELT THOUGHT—THE SOCIAL AND POLITICAL IDEAS OF FRANKLIN DELANO ROOSEVELT 164 (1958).

250. WILLARD RANGE, FRANKLIN DELANO ROOSEVELT'S WORLD ORDER 103-06 (1959); Lowell Young, Franklin Delano Roosevelt and Imperialism (1970) (unpublished Ph.D. dissertation, on file with author). Roosevelt's actions included the Good Neighbor Policy of 1932; his refusal, in 1933 and 1934, to intervene in the Cuban civil war; his encouragement of a Hemispheric doctrine of non-intervention, enshrined in the Montevideo Convention of 1933 and withdrawal of the United States Marines from Haiti; and his signature of the 1934 Tydings-McDuff Act, providing for the independence of the Philippines in 1944.

251. ROOSEVELT, *supra* note 217, at 35-39, 41-42; WILLIAM R. LOUIS, IMPERIALISM AT BAY—THE UNITED STATES AND THE DECOLONIZATION OF THE BRITISH EMPIRE 1941-1945, 19-22 (1970).

February, 1943, he was shocked by his observations of what he perceived to be exploitation and miserable living conditions. He privately noted to Morocco's Sultan Mohammed V that the Four Freedoms and the Atlantic Charter applied to the colonies, and he publicly expressed the view that the days of exploitation were over.²⁵² Roosevelt's his close advisers reported on his determination and readiness to eradicate imperialism and improve conditions in the poorer countries.²⁵³

Extremely strong anti-colonial views were also expressed by several other high-ranking administration officials, including Under-Secretary of State Welles, although there were some more moderate official views, such as that expressed within the new State Department Committee on Colonial Problems in October, 1943:

The view was expressed, that the United States does not demand that all colonies should be liberated immediately or should be put into one pot. However, the United States, tempering its own idealism with the requirements of the moment or with the circumstances of its own position, does desire to alter the course of one and a half centuries of imperialism by bringing united opinion to bear upon colonial administration. This Government . . . should therefore seek to apply the good neighbor policy to dependent areas as well as sovereign states.²⁵⁴

We will return to Administration attitudes in Parts VI—VIII, when we assess

252. RANGE, *supra* note 250, at 105-06.

253. Young, *supra* note 250, at 272-74; ELEANOR ROOSEVELT, THIS I REMEMBER 281 (1949); CHRISTOPHER THORNE, ALLIES OF A KIND 594-95 (1978); LOUIS, *supra* note 251, at 586; ROOSEVELT, *supra* note 217, at 72-76, 84-87, 110-16, 162-65 & 222-25.

254. Sumner Welles, Memorial Day address, May 30, 1942 (calling for "a new frontier of human welfare," the "sovereign equality of peoples" and the end of discrimination between peoples on the basis of "race, creed or color" and noting that the age of imperialism was ended), *Welles Predicts World Policing*, N.Y. TIMES, May 31, 1942, at A1. However, Secretary Hull complained about the tenor of the remarks and the fact that he had not been previously consulted by Welles (a close intimate of the President, unlike Hull). HULL, *supra* note 212, at 1227-28. At least, however, Hull thought that the Atlantic Charter applied to all peoples everywhere who were seeking independence. HOLBORN, *supra* note 214, at 264-65; Haas, *supra* note 238, at 5 (citing HARLEY NOTTER, POSTWAR FOREIGN POLICY PREPARATION, 1939-1945, DEP'T ST. BULL., 3580, 1952, at 109)). For a summary of official statements see Hartley Notter, *Official Statements and Views Pertaining to the Administration of Department Areas After the War*, Aug. 31, 1944, microformed on CIS No. 540-240 (Congressional Info. Serv) [hereinafter CIS]. The document was produced in connection with the work of the U.S. Department of State Advisory Committee on Post-War Foreign Policy, established around Dec. 28, 1941. "Its work was divided among a large number of Subcommittees served by the Department's Division of Special Research, established in 1941 to advise the Committee's predecessor, the Advisory Committee on Problems of Foreign Relations, and to study post-war problems. The senior Subcommittee was on Political Problems. The mandate of the Committee, as clarified in Feb. 1942, was to "translate the broad principles of the Atlantic Declaration" and other related pronouncements." Laing, *supra* note 207, at 124 n.52. See also POST WORLD WAR II FOREIGN POLICY PLANNING—STATE DEPARTMENT RECORDS OF HARLEY A. NOTTER, 1939-1945, bibliography ix-xii (CIS ed., 1987).

the impact of the Atlantic Charter's self-determination principles on the modern norm.

V. VIEWS AND CLAIMS BASED ON ATLANTIC CHARTER

A. *Global Discussion About the Atlantic Charter's Universal Application*

Between August 1941 and UNCIO, there was intense discussion about the Atlantic Charter's applicability as a New Deal for the world. This occurred both within the United States and its major allies and within the minor allies and non-self-governing territories. The subjects discussed included entitlement to universal human rights and fundamental freedoms, self-government and self-determination, improved social welfare and the betterment of economic conditions and relations within and between nations and territories. The inter-relationship of social and economic desiderata with civil and political imperatives was often articulated, sometimes within a conceptual framework which sought to establish a world order based on the parity of people,²⁵⁵ founded on the Atlantic Charter, since

it would be a tragedy as catastrophic as military defeat if the Atlantic Charter should turn out to be another deceptive mirage of war rationalization. For it not to be, it will need to become the long awaited Magna Charta of the colonial people, an international bill of rights for all minorities and a revolutionary extension of the democratic principles of equality to cover the parity of all people, races and nations.²⁵⁶

One British newspaper saw in the Atlantic Charter a renunciation of imperialism²⁵⁷ though there was an American complaint about its ominous silence about such problems.²⁵⁸ Several leading religious figures and organizations called for complete colonial emancipation, possibly through a

255. Alain Locke, *The Price of Democracy*, 31 SURV. GRAPHIC 456, 457-58 (Nov. 1942). Distinguished contributors to the articles in the issue included Assistant Secretary of State Adolf Berle.

256. *Id.* at 457-58.

257. On August 16, 1941, two days after the Charter's promulgation, the British socialist newspaper, the *Daily Herald*, suggested that phrases such as the Fifth Point were a "renunciation of Imperialism for all time" and a dedication of "the power and influence of the two countries to the betterment of working people throughout the world." Editorial, DAILY HERALD, Aug. 16, 1941; Editorial, *After the Atlantic Conference*, CHRISTIAN CENTURY, Aug. 27, 1941, at 1045, 1047.

258. See Henry N. McCracken, *An Examination of the Eight Points*, 7 VITAL SPEECHES 679-85 (1940-41); Sir Alfred Watson, *The Atlantic Charter—A Warning Note*, 157 GR. BRIT. & E. 10-11 (Dec. 27, 1941).

trusteeship system.²⁵⁹ At major conferences on peace aims, sponsored by leading non-governmental organizations, views were aired on the colonial implementation of the political freedoms in the Atlantic Charter.²⁶⁰ Similar views were expressed by sections of organized labor.²⁶¹ In this part, however, I will largely focus on the views and claims of grass-roots leaders and wielders of opinion in or from dependent territories in the Pacific and other parts of Asia, Africa and the Americas.

B. Pacific Charter and Other Claims in Asia

Several American writers advocated a "Pacific Charter," whose main ingredient would be self-determination. So did Herbert Evatt, the Australian Minister of External Affairs, and several United States Congressmen. In the Pacific countries themselves, there were similar local calls for a Pacific Charter or for independence based on the Third Point or stipulated by such aspects of the war as the Japanese occupation of Indonesia.²⁶²

A stimulant to emancipation fervor in Western Asia was the persecution and displacement of Jewish populations in Europe, which led to their mass migration to Palestine, where the Jewish minority had been coexisting with the Arabic majority under the British Mandate from the League of Nations. The British reaction to the new migration had been a statement of policy in May 1939, that from that year, only 75,000 Jewish immigrants would be admitted each year, for five years and that, thereafter, there would be no

259. WALTER W. VAN KIRK, *RELIGION AND THE WORLD OF TOMORROW* 33, 88-98 (1941) discussing, inter alia, proposal and views of the National Peace Council of Great Britain, the Committee to Study the Organization of Peace, and the Conference on World Economic Cooperation (sponsored by the National Peace Conference).

260. Frederick Field, *The Mount Treblant Conference*, 12 FAR EASTERN SURVEY 3-10 (Jan. 11, 1943); *Excerpts from Yugoslavia's Memorandum on Territorial Claims Against Italy*, N.Y. TIMES, Sept. 17, 1945, at A2. See also *Summary of Reports of Cooperating Groups, in UNIVERSITIES COMMITTEE ON POST-WAR INTERNATIONAL PROBLEMS, FINAL REPORT*, 401 INT'L CONCILIATION 696-710 (June 1944). See W. Hocking's analysis of the problem of colonies and dependent areas: "the United Nations, through the Atlantic Charter . . . have committed themselves to a program envisaging independence as a goal for all peoples, the eventual abolition of dependency everywhere. . . ." "Problem IX, Analysis," attached to *id.* at 1-33.

261. David Dubinsky, *Labor Stands by the Atlantic Charter*, 51 AM. FED'N 6, 32 (1944).

262. Joaquin Elizalde, *The Meaning of a Pacific Charter*, 6 AMERASIA 83, 85 (Apr. 1942); Harry Howard, *Wanted: A Pacific Charter*, 11 COMMON SENSE 242-43 (1942); Julius Stone, *The Atlantic Charter and the Problems of Southeast Asia and the Pacific*, in AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS, AUSTRALIA AND THE PACIFIC 71-73, 111 (1944); HALLETT ABEND, *PACIFIC CHARTER OUR DESTINY IN ASIA* 278-80 (1943).

In Indonesia there was a strong independence movement which, apparently, was dashed after the Japanese occupation commencing March, 1942. Actually, this occupation helped to keep alive the embers of independence, especially in light of Japan's promotion of Pan-Asian consciousness. And increased Indonesian participation in government under the Japanese helped to stoke the nationalistic flame. See ROBERT MCMAHON, *COLONIALISM AND COLD WAR—THE UNITED STATES AND THE STRUGGLE FOR INDONESIAN INDEPENDENCE*, 1945-49, 41-42 (1981); S. TAS, *INDONESIA: THE UNDERDEVELOPED FREEDOM* 106-13 (1974); J. ROBERTSON & J. SPRUYT, *A HISTORY OF INDONESIA* 212-15 (1979); W. ELLSBREE, *JAPAN'S ROLE IN SOUTHEAST ASIAN NATIONALIST MOVEMENTS 1940-1945*, 3-51, 59-77, 84-96, 100-08 & 163-67 (1953).

further immigration unless the local Arabs were prepared to acquiesce to it.²⁶³

Despite British efforts to enforce this policy, the wave of Euro-Jewish illegal immigrants increased. It occasionally received public support from the United States government, as evidenced by Secretary Hull's 1942 statement that:

The fate of [Jews] must be ever before us in the efforts we are making today for the final victory. [A]t the moment of triumph under the terms of the Atlantic Charter the United Nations will be prepared not only to redeem their hopes of a future world based upon freedom, equality and justice but to create a world in which such a tragedy will not again occur.²⁶⁴

Efforts to resettle Jews incurred Arab displeasure, as expressed in an April 30, 1943, letter to Roosevelt from King Ibn Saud of Saudi Arabia, recalling that the high principles for the war had been proclaimed in the Atlantic Charter. As a result of such complaints, assurances were given by the United States to Arab governments that no decision would be reached on Palestine without consultation with both Arabs and Jews.²⁶⁵

Hull showed some consistency in a plan for the region, approved by the President, which he sent to U.S. Ambassador Winant in London in August 1942. It included the, "assurance of the support of the United States for [the] aspirations of the peoples [there] to independence after the war if, in line with American foreign policy and the Atlantic Charter, these peoples actively assist in winning it."²⁶⁶ The next month, in supporting the idea for a binational Palestinian State, the State Department's Post-War Foreign Policy Committee's Political Sub-Committee noted that a primary reason for support was that definite Jewish preponderance would be achieved through Jewish immigration and Arab emigration. One of the Committee members thought that the Four Freedoms and the Atlantic Charter justified the establishment of such a state.²⁶⁷ While even-handedness might appear

263. U.S. Dep't St., *reprinted in* V FOREIGN REL. U.S. 560 (1944) (citing U.K., Cmd. 601 (May, 1939)). The author takes full responsibility for all citations in FOREIGN REL. U.S.

264. U.S. Dep't St., Press Release, Oct. 30, 1942, *reprinted in* IV FOREIGN REL. U.S. 548 (1942). Hull's statement was issued in reply to a memorandum presented to him by a group of American Rabbis in connection with the 25th anniversary of the Balfour Declaration (of Nov. 2, 1917) in which Great Britain had expressed support for "the establishment in Palestine of a national home for the Jewish people . . . it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities." 17 ENCYCLOPEDIA BRITANNICA 957 (1980).

265. Implying that they were violated by the Jewish resettlement, IV FOREIGN REL. U.S. 773 (1943). Memo by Secretary of State Stettinius to FDR, Dec. 13, 1944, V FOREIGN REL. U.S. 648 (1944).

266. Hull, *supra* note 212, at 1583.

267. U.S. Dep't St., Division of Special Research, Sept. 5, 1942, *microformed on* CIS No. 551-25.

rather strained here, nearly eighteen months later the Department's Inter-Divisional Area Committee on Arab Countries was noting the political and economic dangers of uncontrolled immigration into Palestine and agreeing that the immigration policy "should be based on the principle that the welfare of Palestine and its inhabitants judged by the economic requirements of both Arab and Jewish communities should be the determining factor."²⁶⁸

This high-level Administration support for the Jewish cause was paralleled in other sectors of the government, as illustrated by the Resolution introduced in February 1944, by Senator Wagner and others in the U.S. Senate. It demanded that restrictions upon immigration be lifted and that Palestine be set up as a democratic Jewish commonwealth. Similar views were expressed in the platforms of both major political parties and in individual political campaigns. These actions had a very hostile reception in the Western Asian press and governmental circles in such countries as Egypt, Iraq, Lebanon and Syria and within the newly-established Arab League. Throughout, the incompatibility with and violation of the Atlantic Charter was stressed.²⁶⁹ With the Atlantic Charter being piously cited by both sides it was, perhaps, a wishful thought that the instrument "would introduce an era of peace, prosperity and security unprecedented for centuries"²⁷⁰ in the region.

Peace, prosperity, security and, of course, freedom had also long been scarce commodities in eastern mainland Asia, where vast portions were a steamy laboratory of imperialism. Previously, various local nationalistic movements intermittently had emerged with varying degrees of strength. During the war, some of these were nourished by threatened or actual Japanese invasions and, in Indochina, by the experience of the local elites participating in governments under Japanese overlordship.²⁷¹

Another stimulant to mainland Asian nationalism was the Atlantic Charter. As early as August 17, 1941, Burmese Premier, U Saw expressed his assumption that the Charter applied to his country.²⁷² During his October visit to London, he made it clear to the press that he believed that there were interrelationships between Burmese freedom, the Burmese war effort and the Atlantic Charter. However, he was unsuccessful in his efforts to persuade the British government to make "some public pledge to support

268. Palestine Immigration, Mar. 1, 1944, *microformed on* CIS No. 1090-20.

269. See V FOREIGN REL. U.S. at 565, 570, 571-73, 578-79, 607-08, 621, 628-29 & 645 (1945); VII FOREIGN REL. U.S. 744-45, 793-94 (1945); The notion of a Jewish Commonwealth or State was also objected to by several high U.S. officials on similar grounds (see J. Landis to FDR, Jan. 17, 1945, VII FOREIGN REL. U.S. 681-82 (1945)) and on geo-political grounds (Stettinius to FDR, Dec. 13, 1944, V FOREIGN REL. U.S. 648-49 (1944)).

270. Taylor, *The Near East: Yesterday and Today*, in VIOLET ANDERSON, THE UNITED NATIONS TODAY AND TOMORROW 99 (1943).

271. D.A. Low, *The Asian Mirror to Tropical Africa's Independence*, in PROSSER GIFFORD & WILLIAM LEWIS, TRANSFER OF POWER IN AFRICA—DECOLONIZATION 1940-1960 1-29 (1982).

272. JOHN F. CADY, A HISTORY OF MODERN BURMA 429 (1958).

Burma in its desire for full and immediate dominion status."²⁷³

One motivation for the Premier's concern was Churchill's strong parliamentary statement of September 9, 1941, which appeared to challenge the Atlantic Charter's applicability to the British Empire, a statement which we now know, the American Ambassador to London had tried to persuade him to modify. During a November 1941 visit to the United States, U Saw wrote Roosevelt requesting that the United States should not "regard the case of Burma as a domestic issue for the British Empire."²⁷⁴ However, Hull advised Roosevelt not to reply.²⁷⁵

In India, Churchill's remarks were greeted by negative comments in several journalistic and local government circles.²⁷⁶ This was understandable, in view of the fact that many in Great Britain, the United States and elsewhere assumed that the Atlantic Charter's thrust was at least to liberate India.²⁷⁷ When this did not materialize, the All-India Congress Party's Working Committee adopted a resolution on August 5, 1942, that India would become an ally of the United Nations only if India were granted freedom.²⁷⁸ This was accompanied by passive resistance, leading to the imprisonment of the party's entire leadership by the British authorities and to Ghandi's fast, between February and March 1943, to obtain their release.²⁷⁹ Not surprisingly, therefore, Jawaharlal Nehru called the

273. Stone, *supra* note 262, at 70, 83-84. The Premier also appealed to Roosevelt, in a confidential letter on November 26, 1941.

274. Venkataramani, *supra* note 136, at 25 (citing letter of Nov. 26, 1941, in President's Secretary's Files "Burma" in FDR Library).

275. Venkataramani, *supra* note 136, at 3-25. Actually on close analysis, Churchill's controversial statement does not truly appear to be as inconsistent with the commitment to Burmese and Indian freedom as many allege. Further, he stressed congruence of general British policy with and, implicitly, continued adherence to the Atlantic Charter. In the statement, he noted that: (1) the Atlantic Charter did "not try to explain how [its] broad principles . . . are to be applied to each and every case, which have to be dealt with when the war comes to an end;" (2) it "does not qualify in any way the various statements about the development of constitutional government," in the sense of India's equal partnership with U.K. in the British Commonwealth and of self-government of Burma; and (3) "At the Atlantic meeting we had in mind primarily, the restoration to the sovereignty, self-government and national life of the states and nations of Europe now under the Nazi yoke, and the principles governing any alterations in the territorial boundaries which may have to be made. So that is quite a separate problem from the progressive evolution of self-governing institutions in the regions and peoples owing allegiance to the British Crown. We have made declaration on these matters which complete in themselves, free from ambiguity related to the conditions and circumstances of the territories and places affected. They [are] entirely in harmony with the high conception of freedom and justice which inspired the [Atlantic Charter]." HOLBORN, *supra* note 214, at 210-11; Venkataramani, *supra* note 136, at 23. See also *infra* notes 397-99.

276. Including the TIMES OF INDIA, CIVIL AND MILITARY GAZETTE and the PREMIER OF PUNJAB. See 157 GR. BRIT. & E. 231 (Oct. 9, 1941).

277. Viscount Samuel, *Thoughts on the Atlantic Charter*, 161 CONT. REV. 1-2 (Jan. 1944); NATIONAL PEACE COUNCIL, THE ATLANTIC CHARTER—THE ROOSEVELT-CHURCHILL DECLARATION 5 (1941); *The Eight Points*, 97 CHINA WKLY. REV. 355-56 (Aug. 23, 1941).

278. See generally N.Y. TIMES, Aug. 6, 1942.

279. *All-India Congress Takes New Course*, N.Y. TIMES, Oct. 1, 1942.

Atlantic Charter “a pious and nebulous expression of hope,”²⁸⁰ while demanding his country’s independence. Elsewhere in Asia, calls for colonial emancipation based on the Atlantic Charter came from leading Filipino thinkers; in Hanoi, in the form of public wall posters such as “Don’t forget the Atlantic Charter;” and in Indochina, popular oral reminders to visiting American journalists that the United States had promised in the Atlantic Charter to free all peoples.²⁸¹

C. African Reliance On The Atlantic Charter

In the Pacific, in parts of Asia near to and far from Europe, and in the Americas, hopes based on the Atlantic Charter did not immediately seem to bear fruit. It is therefore not surprising that the same was the case in so-called dark Africa, which was considered much less developed and ready for self-government than Burma or India.

In Nigeria there were immediate euphoric reactions to the Atlantic Charter, followed by disillusionment after unfavorable British government statements about its colonial applicability.²⁸² In the Gold Coast, initially favorable responses by the intelligence were succeeded by disappointment on the same grounds. Although, in that country, there was apparently relative ignorance about the strong pronouncements within the United States and elsewhere about self-determination of colonial peoples, and censorship or sedition laws dampened expansive public debate, there was nevertheless reliance on the Charter’s principles.²⁸³ This was illustrated by calls in the Legislative Counsel for a better constitution and greater self-government.²⁸⁴

West African reliance on the Atlantic Charter reached its peak in 1943, when on August 1, a press delegation visiting Great Britain submitted to the Colonial Secretary a memorandum on Post-War Reconstruction of the Colonies and Protectorates of British West Africa. *Inter alia*, this called for increased self-government and improved social and economic conditions

280. Jawaharlal Nehru, *The End of Imperialism*, in BEYOND VICTORY 144 (Ruth N. Anshen ed., 1943). In the decade of the 1930s he had regarded Roosevelt as a symbol of hope. His initial reactions to the Four Freedoms and Atlantic Charter were favorable; K. SHIVANNA, NEHRU, ROOSEVELT AND AMERICA 79, 176-204 (1982). In the U.S., at a meeting in the New York Town Hall on Aug. 9, 1943, attended by over 1,500 persons, a resolution was adopted declaring that India’s just demands for freedom have become a test of the sincerity of the provisions of the Atlantic Charter among millions of the Near East and Far East. See also K.T. SHAH, FOUNDATIONS OF PEACE 165 (15).

281. John Uhler, *America Faces Reservoirs of Hate*, 157 CATHOLIC WORLD 18, 25 (Apr. 1943).

282. G.O. OLUSANYA, THE SECOND WORLD WAR AND POLITICS IN NIGERIA 1939-1953, 57-68 (1973).

283. Wendell P. Holbrook, *The Impact of the Second World War on the Gold Coast: 1939-1945*, 343-45 & 392-95 (Ph.D. dissertation, Princeton University, 1978) (on file with the author).

284. G. Moore, *Legislative Council Debates*, 135-38, 152-53, (1943) reprinted in G.E. METCALFE, GREAT BRITAIN AND GHANA—DOCUMENTS OF GHANALAN HISTORY, 1807-1957 666 & 668-69 (1964).

consistent with the Atlantic Charter. However, the memorandum was apparently ignored.²⁸⁵ Even in Morocco, smothered by a tough French protectorate, nationalists demanded independence and adherence to the Atlantic Charter.²⁸⁶

D. In the Americas

Most of the mainland developing countries in the Americas were no longer under the yoke of overt political imperialism, hence there was less agitation due to the war or the Atlantic Charter. At least one nation regarded the Third Point as “an endorsement of a policy that has produced the best results in their relations with the United States and has opened a new era of continental solidarity known as the Good Neighbour Age . . .”²⁸⁷ The Charter was seen as “President’s Roosevelt’s victory in the name of American ideals over the old beliefs of European imperialism and . . . the cleansing spirit of great social and political forces, all seeking only one thing: peace without empire . . .”²⁸⁸

Similar ideas surfaced in the British colonial Caribbean.²⁸⁹ In a 1949 Jamaican novel set in the war years, an aged protagonist speaking to his nephew prior to the 1944 Constitution bestowing partial self-government, said, “[m]any high men in Europe hold that stronger she would be if in the fight against the giant squid [Germany] she would loosen up some of her own holds . . .”²⁹⁰ And the protagonist politician’s nephew is fictionally reported to have said to audiences, in an obvious reference to the Atlantic Charter, “[g]et rid of imperialism . . . Implement the four freedoms—do not allow them to drift down the Atlantic!”²⁹¹ At a July 1943 meeting held in Havana, the executive committee of the Confederation of Latin-American Workers adopted a resolution expressing the hope that the United States

285. OLUSANYA, *supra* note 282, at 69. Olusanya notes that the Nigerian PILOT reported on Nov. 12, 1941, that a telegram had been sent from Nigeria to Churchill asking him to clarify the Atlantic Charter, especially Points Second and Third. Churchill’s reply was that it was not incompatible with the progressive evolution of self-government in Nigeria and elsewhere. *Id.* at 57.

286. Memo by C. Elbrick, annexed to R. Childs., Oct. 2, 1943, IV FOREIGN REL U.S. 744 (1943); Mayer to Secretary of State, Jan. 12, 1944, V FOREIGN REL. U.S. 531-32 (1944). In fact, American agents, in chiding French officials about oppressive conduct, referred to the Atlantic Charter as a touchstone. See Plitt to Secretary of State, Oct. 29, 1947, V FOREIGN REL. U.S. 727-28 (1947). On Morocco, see generally Charles A. Julien, *Crisis & Reform in French North Africa*, 11 FOREIGN AFF. 444-55 (Apr. 1951).

287. G. Turbay, *The Atlantic Charter*, 76 BULL. PAN AM. UNION 324, 325-27 (June 1942).

288. *Id.* at 327.

289. One visitor warned about the sense of expectation, an uneasy waiting in an uncertain tomorrow and an atmosphere “dry as tinder” in such “colourful sun-drenched” islands as Trinidad, where the “set-up [was] hardly consonant with the Atlantic Charter.” I.C. Thiman, *In Trinidad*, in WORLD REV. 37-40 (Sept. 1943).

290. V.S. Reid, NEWSDAY 335 (1949, c.1973) (“she” refers to Great Britain).

291. *Id.*

would comply with the Atlantic Charter and give Puerto Rico independence.²⁹²

*E. Africans and African-Americans In The United States
And The United Kingdom*

Claims were also made by certain organizations, concerned with the welfare of Africa and the colonies, operating in the United States and Great Britain. Importantly, their documentation was collected by the United States Department of State in its files dealing with the implementation of the Atlantic Charter and the planning for post-war order.²⁹³

One of these organizations was the Committee on Africa, established in August 1944, by the Phelps-Stokes Fund, a foundation interested in African education.²⁹⁴ Its major production was its 1942 Report, "The Atlantic Charter and Africa,"²⁹⁵ which consisted of a Point-by-Point analysis of the Charter and its possible application to ameliorating conditions in Africa. In relation to the Fifth Point, the Report advocated an approach of staged gradualism, urging that "all colonial areas in Africa should be under some form of international mandate inspection and that all such areas should pass through the stages of guardianship and participation in governments,"²⁹⁶ leading it to autonomy.

A more nationalistic organization was the African Students Association of North America. Its organizers included several future African leaders, e.g. Kwame Nkrumah, Prince A.A. Nwafor Orizu, K.O. Mbadiwe and Ako Adejei. They agitated for colonial freedom, often citing the Atlantic Charter.²⁹⁷

The rather assertive Council on African Affairs was formally inaugurated in October 1941 with the goals of political liberation and material and social progress for Africa. For a time it had ready access to the Department of

292. See generally N.Y. TIMES, Aug. 1, 1943.

293. The files are discussed in part VI of this article.

294. Hollis Lynch, *Pan-African Responses in the United States to British Colonial Rule in the 1940s*, in GIFFORD & LOUIS, *supra* note 271, at 75.

295. THE COMMITTEE ON AFRICA, THE ATLANTIC CHARTER AND AFRICA 3-5, 12, 33-5, 37-41, 54-58 & 104-05. The Report is reviewed by John La Farge, *Light of Atlantic Charter Illumines Darkest Africa*, 37 AMERICA 404 (July 18, 1942); Kate L. Mitchell, *A Modern Policy for Africa*, 6 AMERASIA 275-86 (Aug. 1942). The Report was widely read, though apparently not considered influential, in official circles on both sides of the Atlantic.

296. COMMITTEE ON AFRICA, *supra* note 295, at 56.

297. The persons mentioned in the preceding sentence of the text were respectively future Prime Minister of Ghana, President of the Nigerian Senate, holder of several Cabinet positions in Nigeria and Ghanaian Foreign Minister. Several of them rendered advice and made written submissions to the Committee on Africa, and the Atlantic Charter (especially alleged non-application to Africa) featured prominently in their writings. Several members of the Association were later active in the African Academy of Arts and Research, established in November and December, 1943 with a strong emphasis on African culture and nationalism and with strong support of American liberals, including Eleanor Roosevelt, the First Lady. Lynch, *supra* note 294, at 71-77.

State, especially after the establishment in 1944 of its new division of African Affairs.²⁹⁸ One of the major events organized by the Council was the Conference on "Africa—New Perspective," held on April 14, 1944.²⁹⁹ It was attended by 127 delegates from the United States, British West Africa, the Caribbean and India, and governmental representatives from the Soviet Union, Belgium, Ethiopia and the French National Committee. The Atlantic Charter was the keynote of the Conference.³⁰⁰ Resolutions adopted urged American leadership to secure international action for African progress, and reforms to promote improved African production and living standards, including educational and social facilities and morale. Above all, there was a call for an African Charter, application of the Atlantic Charter to Africa, and self-government and self-determination.³⁰¹

In June of 1945, some of the same themes were covered in the All-Colonial People's Congress convened in London, England by the Pan-African Federation, along with the Federation of Indian Associations in Britain, the Burma Association and the West African and Ceylonese Student organizations. Among other things, they called for the liquidation of imperialism and the application of the Atlantic Charter to the colonies.³⁰² In October 1945, the Pan-African Federation and several other groups held the Fifth Pan-African Congress in Manchester, England. Delegates included several future leaders of the anti-imperial struggle in Africa and the Caribbean.³⁰³ Among the resolutions adopted, was the Declaration to the Colonial Powers, which affirmed the Congress' belief in peace and in the principles of the Atlantic Charter, warning, however, that "as a last resort force might have to be used in the struggle for independence."³⁰⁴ In several resolutions the Congress called for the liberation of several specific colonies, in some cases

298. *Id.* at 61-62.

299. *Id.* at 60.

300. It was stressed in the Agenda and by the main speakers and prominently mentioned in the resolutions which were adopted. Roosevelt's speech of Feb. 23, 1944, concerning the universal application of the Atlantic Charter, was highlighted in the frontispiece of the Proceedings, which also contained an excerpt from an article by Nkrumah (on African youth) in which the importance of the Charter was urged. Also included in the Conference proceedings is the August 1943 memorandum, on the Atlantic Charter and British West Africa, of the West African Press Delegation to London.

301. Lynch, *supra* note 294, at 60-62.

302. JAMES R. HOOKER, *BLACK REVOLUTIONARY—JAMES PADMORE'S PATH FROM COMMUNISM TO PAN-AFRICANISM* 83-89 (1967). In April, 1945 the Pan-African Federation and several other organizations based in Great Britain addressed a manifesto to the U.N. Conference in San Francisco, inter alia reminding the Great Powers of their adherence to the Atlantic Charter and urging "full" African self-government within a definite time limit. J. AYODELE LANGLEY, *PAN-AFRICANISM AND NATIONALISM IN WEST AFRICA—A STUDY IN IDEOLOGY AND SOCIAL CLASSES* 348-49 (1973).

303. Including Nkrumah, Sierra Leone's Wallace-Johnson, Nigeria's Awolowo, Kenya's Kenyatta, Nyasaland (later Malawi)'s Banda.

304. LANGLEY, *supra* note 302, at 354.

invoking the Atlantic Charter.³⁰⁵

VI. UNITED STATES COMMITMENTS ON NON-SELF-GOVERNING TERRITORIES, 1941-1945

A. *The Atlantic Charter And Planning For Non-Self Governing Territories*

Around December 28, 1941, there was established in the Department of State, an Advisory Committee on Post-War Foreign Policy which assumed the functions of the Committee's predecessor, the Advisory Committee on Problems of Foreign Relations. The Committee's mandate, as clarified in February 1942, was to translate the broad principles enunciated in the Atlantic Declaration³⁰⁶ and related pronouncements. The work of the Committee was handled by numerous subcommittees, senior of which was the Political Subcommittee, itself with several subcommittees, including those on International Organizations, Territorial questions, Legal questions and International Security Organization.

Much of the diplomatic activity described in Part V and this Part was facilitated by the work done by these Sub-Committees and by the Department's Division of Special Research.³⁰⁷

B. *Early Ideas About Trusteeships Lead To Declaration To Implement The Atlantic Charter*

Roosevelt's views on trusteeship began to crystallize during the late 1930s. According to Range, his conception of trusteeship at that time was as a means of strengthening the defense system of the Western Hemisphere. In April 1940, he indicated, off the record, that he envisaged something like a trusteeship for Greenland.³⁰⁸ One month later he wrote his wife about a possible trusteeship for refugees—to be located in the Guianas. Around that time he also advocated trusteeship for the Western Hemisphere territories

305. GEORGE PADMORE, *HISTORY OF THE PAN-AFRICAN CONGRESS* 53 (2d ed. 1963); (memorandum from the St. Kitts Workers League and the St. Kitts-Nevis Trades and Labour Union); *id.* at 54 (Dr. Peter Milliard, British Guiana); *id.* at 55-66 (Congress Resolution on West Africa); *id.* at 56 (Congress Resolution on Congo and North Africa); *id.* at 57 (Congress resolution on East Africa); *id.* at 60-62 (resolution by British West Indian representatives).

306. See HULL, *supra* note 212, at 1632-33; NOTTER, *supra* note 254, at 149-50.

307. Mainline Committees which handled aspects of the Department's work on non-self-governing territories included the Inter-Divisional Committee on Colonial Problems (which held its first meeting on September 28, 1943); the Committee on Colonial and Trusteeship Problems (the new name, given in July, 1944, to the Committee established Sept. 28, 1943); and the Working Committee on Problems of Department Areas. The bulk of the work on Trusteeship was assumed by the Informal Political Agenda Group set up in early 1944 to formulate plans for the creation of the organization envisaged in the Moscow Declaration of October 1943. R. Hooper, *Historical Survey of Dependent Area, microformed on CIS No. 850, P.I.O. 712.*

308. WILLARD RANGE, *FRANKLIN ROOSEVELT'S WORLD ORDER* 104, 109-12 (1959).

of European States overcome by the Axis powers. During the remaining years of his life, he was a firm believer in the virtues of trusteeship as a means of improving the lot of dependencies not yet ready for independence. Such territories, he thought, should include both existing mandated territories and other dependent entities.³⁰⁹

From the earliest phase of their study of possible post-war solutions of the problem, State Department functionaries also preferred an inclusive approach which would take into consideration the dictates of the Atlantic Charter.³¹⁰ These considerations were clearly in the minds of the Political Sub-Committee in early August 1942. On August 8, 1942, the Sub-Committee unanimously expressed the view that the United States should work for the liberalization of the people of the Far East.³¹¹ The Sub-Committee's conclusion was that this should particularly be done through some form of international trusteeship, which should seek to accomplish the objects of assisting the peoples to attain political maturity and to control the raw materials of the area, in the interests of all peoples.³¹²

In late August 1942, Hull discussed his view and Roosevelt's with British Ambassador Halifax, that the principles of the Atlantic Charter applied to colonial territories and that they could be utilized to guide opinion wisely in relation to backward peoples.³¹³ Specifically, he proposed a general public statement to provide the means for reconciling the different comments of both governments on the Atlantic Charter.³¹⁴ To Halifax's remark that the British Cabinet was considering an unilateral statement on British responsibilities toward its colonies, Hull argued that a joint declara-

309. LOUIS, *supra* note 251, at 3-4.

310. Harley Notter, *Basic Questions for Research and Discussion*, attached to memo of Feb. 11, 1942 to Pasvolksy; *Permanent International Organization, Functions, Powers and Machinery and Procedure: Trusteeship Over Dependent Areas—League of Nations Experience*, Aug. 27, 1943, *microformed on* CIS No. 860, P.I.O. 153.

311. Mr. Arthurton mentioned that the Atlantic Charter was in line with that principle, and Mrs. McCormick mentioned the principle of trusteeship in that regard. To her question whether the United States had made any commitments with respect to this question, Welles gave a negative answer. Later-on, after McCormick had noted, with reference to dependent territories which had come into enemy hands, that the Atlantic Charter meant the liberation of peoples, Under-Secretary Welles observed that the disposal of the territory and peoples separated from their sovereign should be governed by the principle of the liberation of peoples. This was where trusteeship came in, he noted. He later-on expressed the belief that the principle should be applicable to the whole world, not only to the Far East. However, when pressed by Mr. Hornbeck, who asked whether the Japanese should be deprived of the islands under their control, Welles noted that certain economically less-advanced territories (e.g. Pacific atolls) and certain peoples, e.g. blacks (who did "enough to live on and no more") did not deserve trusteeship. Neither did Hawaii and Alaska, which were "beyond [the Committee's] concern" and whose people were "in general satisfied." Welles also revealed that the Soviet Union had agreed to the trusteeship idea and had indicated its willingness to support the United States. However, the British government had not been consulted. *Id.*

312. U.S. Dep't St., Division of Special Research, Aug. 8, 1942, at 15, *microformed on* CIS No. 551-21.

313. J.E. Williams, *The Joint Declaration on the Colonies: An Issue in Anglo-American Relations, 1942-1944* 2 BRIT. J. INT'L STUD. 267, 274 (1976).

314. *Id.* at 275.

tion would be preferable, since it would have great defensive value against criticism in the United States. Nevertheless, consideration of the matter continued within the British Government.³¹⁵

Some time that month, consideration began in earnest in the International Organization Sub-Committee. On August 28, 1942, it discussed a memorandum which projected a trusteeship system encompassing all dependent peoples, not only Mandates and territories detached from Axis powers. By early September, after Sub-Committee discussion, Notter had turned the memorandum into a draft plan which might become a protocol to the draft constitution for a general international organization.³¹⁶

The plan began:

The United States should work towards the liberation of peoples of colonial areas. To give effect to this principle, an international trusteeship should be established where necessary to assist the peoples of such areas to attain political maturity and self-government, and to promote the development and use of the economic resources of such areas in the interests of all peoples.³¹⁷

The plan envisaged administration by pre-war powers, other than the enemy states, "subject to supervision by . . . regional councils"³¹⁸ of the representatives of states charged with administrative responsibilities, states having special security interests in the region and self-governing states in the region. The ultimate authority would reside in the executive of the proposed organization and all colonies and other non-self-governing territories would be included.³¹⁹

On November 17, 1942, the November 13th version of that document,

315. WILLIAMS & DE MESTRAL, *supra* note 92, at 274-76; see GIFFORD & LOUIS, *supra* note 271, at 182-83. Actually, as early as May 20, 1942, in a House of Lords debate, the Earl of Listowel (Labor) had recommended a colonial supplement to the Atlantic Charter. Lord Hailey (Conservative) had noted that the consistent British official declarations affirming the principle of trusteeship were insufficient. What was needed was a colonial Charter which, however, should honestly state cases where self-government or the British model of Parliament was undesirable. *Id.* at 140-43.

316. U.S. Dep't St., Division of Special Research, Aug. 28, 1942, CIS No. 851-1 to 841-45; HARLEY NOTTER, POSTWAR FOREIGN POLICY PREPARATION, 1939-1945, 108-10 (1949); Hooper, *supra* note 307, at 45; Work in the Field of International Organization in the Department of State Prior to October 1943, Oct. 4, 1944, *microformed on* CIS No. 1690-1 to 1690-104.

317. International Trusteeship for Non-Self-Governing Peoples, *microformed on* CIS No. 860, P.I.O. 95.

318. *Id.*

319. Each council would "judge whether self-government [had] been established to the general satisfaction of the people of the area . . . and . . . the consequent desirability of the termination of trusteeship." The executive authority would have the responsibility of inspection of the dependent areas, the inhabitants of which would have the right of directly petitioning the regional supervisory councils. The principle of trusteeship would be applicable to colonial areas throughout the world, except in the Western Hemisphere where conditions are different and where related or other arrangements would be advisable." *Id.*

entitled "Atlantic Charter in Relation to National Independence," was submitted to the President by Secretary Hull, who noted three principal possible approaches to the problem of dependent areas: (1) international administration of all, (2) full international administration only of mandated areas and areas to be detached from the Axis powers, plus administration of other territories by their existing colonial rulers under the supervision of the same international organization, and (3) overall international supervision of such areas and undisturbed colonial administration, subject only to a pledge by such rulers to observe certain specified principles and to make public to the world essential information regarding their colonial administration.³²⁰ Hull expressed preference for the third approach as being the most practical solution, which would be acceptable to all concerned and a basis for a forward movement of immense importance to peoples seeking independence. The draft began with the following striking language:

By their adoption of the Atlantic Charter as an integral part of the Declaration of January 1, 1942 the . . . United Nations have thus reaffirmed their determination that the independence of those nations which have been forcibly deprived of independence shall be restored; that opportunity to achieve independence for those people who aspire to independence shall be preserved, and made more effective.

. . .

The particular pledge that people who aspire to independence shall be given an opportunity to acquire independence status, is, therefore, in varying degrees to all the United Nations and to all nations and peoples which now, or which may hereafter cooperate in carrying forward and applying the provisions of the Atlantic Charter.³²¹

The Draft specifically envisaged independence as a goal and required dates to be set in advance.³²²

During November and December 1942, a working group within the British Government finalized its draft Joint Declaration of Colonial Policy. It was presented to the War Cabinet on December 9, 1942, then consultations were held with the Dominions before detailed consideration by Cabinet commenced in early January 1943. Apparently, the most significant outside comment adopted by Cabinet was a Canadian suggestion that the Declaration

320. Memorandum for the President (FDR) from the Secretary of State (Hull), Nov. 17, 1942, *microformed on* CIS No. 1230-3; LOUIS, *supra* note 251, at 182-85; RUSSELL & MUTHER, *supra* note 211, at 84-86.

321. Draft plan attached to Hull to FDR, *supra* note 320.

322. *Id.*

should refer to the Atlantic Charter. However, in the final draft, the document merely read: "The Atlantic Charter looks to the establishment in the future of a wide and permanent system of general security. It will be the special responsibility of Parent or Trustee states to ensure the safety of colonial peoples within this general framework."³²³ This limited reference was quite deliberate, since some members of Cabinet, *e.g.* Cranbourne, thought that "we do not think that the Atlantic Charter [is] at present applicable in its entirety to colonial territories, or at any rate to primitive colonial territories."³²⁴ The British draft did not distinguish between trust and colonial territories and used the expression "parent" state interchangeably with "trustee" state.³²⁵ The parents' duty was to guide and develop colonial peoples until they were able to discharge the responsibilities of government. There would be no international administration, only collaboration by commissions of the parent and other states with strategic and economic interests in the region should be established.³²⁶ There was no reference to independence.³²⁷

The next State Department draft, of March 9, 1943, entitled Declaration by the United Nations on National Independence, was partly based on the draft of the previous November. It adopted the idea of regional commissions from the British proposals, though it distinguished between colonial and trusteeship areas. It also incorporated a plan for international trusteeship administration developed by the International Organization Sub-Committee. The President expressed his general satisfaction with this draft at a meeting with Hull and others, including British Foreign Secretary Eden, in late March. During the spring and summer the American draft received a very adverse reception in the British Cabinet, especially on the issue of independence.³²⁸

During the Quebec Conference in mid-August 1943, Hull thrice asked Eden for his view, which he eventually indicated was negative, due to the use of the word independence in the American draft. Eden noted that the Dominions could nevertheless declare their independence, although none had so far done so or expressed the desire to do so. Again, the British registered their dissatisfaction with the draft during the Foreign Ministers Conference in Moscow, in October.³²⁹

In the meantime, the new Inter-Divisional Committee on Colonial

323. Williams, *supra* note 313, at 277.

324. Cranborne to Stanley, Jan. 14, 1943, *quoted in* LOUIS, *supra* note 251, at 223.

325. Hooper, *supra* note 307, at 30-31; THORNE, *supra* note 253, at 222-24.

326. Hooper, *supra* note 307, at 30-31; THORNE, *supra* note 253, at 222-24.

327. Hooper, *supra* note 307, at 30-31; THORNE, *supra* note 253, at 222-24.

328. Hooper, *supra* note 307, at 33-36; RUSSELL & MUTHER, *supra* note 211, at 88-90; LOUIS, *supra* note 251, at 231-42, 246-55; HULL, *supra* note 212, at 1232 & 1237; WILLIAMS & DE MESTRAL, *supra* note 92, at 282-85; THORNE, *supra* note 253, at 342.

329. Hooper, *supra* note 307, at 37-39; HULL, *supra* note 212, at 1232-38; Williams, *supra* note 313, at 285-86.

Problems had been working on a draft Declaration of Principles Concerning Relations with Dependent Territories, which was issued on February 29, 1944. This draft emphasized self-government and stated more detailed political, social and economic principles than the Declaration of March 9, 1943. However, it omitted reference to trusteeship, but included the obligation to administering authorities to make annual reports. This draft was approved by the high-level Post-War Programs Committee on March 10, 1944.³³⁰

By mid-March 1944, it was therefore evident that the American view was changing. In mid-April, during Under-Secretary Stettinius' mission to London, Isiah Bowman, Vice-Chairman of the Post-War Programs Committee, met Colonial Secretary Stanley and other members of the British Government and failed to demand strict deadlines or even independence itself as an obligation. Instead, they heard Stanley urge that a joint declaration would now be of no political value, though he was willing to take up the suggestion that a section on dependent peoples should appear in the constitution of the proposed world organization. He also conceded that colonial powers should be obligated to publish annual reports, which would be sent to a central body.³³¹

During meetings of the Informal Political Agenda Group of the Working Committee on Problem of Dependent Areas, in the second week of May 1944, Pasvosky, an influential official, was still insisting on having a declaration. The draft being considered still referred to the Atlantic Charter, in the Preamble: "Having regard for the principles enunciated in the Atlantic Charter . . ."³³² In Part I, the first "Principle of Political Development" stated that it was "the duty of all authorities responsible for the administration of dependent peoples to foster in them the capacity for self-government."³³³ Views expressed in the Committee generally favored the thrust of these provisions and the established lines of American policy—favoring the United States "sticking fingers in the pie of others," since what became of dependent peoples was everybody's business.³³⁴

However, in the next few weeks, during the Committee's meetings Bowman showed his desire to water-down the Declaration. For instance, in the meeting of June 2, 1944, he noted his preference for omission of

330. Hooper, *supra* note 307, at 64-69. The Committee on Post-War Programs was established on January 15, 1944, to formulate long-range policy. POST WORLD WAR II, *supra* note 260, at xii.

331. Leo Pasvosky, *Memo on Progress of Our Discussions With British on U.N. Organization and Organized International Relations*, Mar. 15, 1944, *microformed on* CIS No. 794-105; Stanley to Winant, Apr. 28, 1944, *microformed on* CIS No. 794-10, I.S.O. 33; Hooper, *supra* note 307, at 40-44; Williams, *supra* note 313, at 88; LOUIS, *supra* note 251, at 327-33.

332. Declaration of Principles Relating to Dependent Territories (Draft), Apr. 13, 1944, *microformed on* CIS No. 1580, I.S.O. 28, C.D.A. 79.

333. *Id.*

334. Minutes of the International Organization Group, May 10, 1944, *microformed on* CIS NO. 1702-52. See POST WORLD WAR II, *supra* note 260, at 359.

reference to self-government in the Declaration.³³⁵ Thus, he preferred the following language proposed by Cohen for the first principle: "It is the duty of all authorities responsible for the administration of dependent peoples to foster political institutions suited to their needs and to develop in them the capacity for self-government."³³⁶

At its mid-June meeting, the Post-War Committee decided, *inter alia*, that the United States should undertake to obtain agreement of other states to the Declaration and recommended it to the Secretary. This document's main reference to independence was the provision that administering authorities should arrange that peoples which desire to be self-governing and which have demonstrated adequate capacity, shall become self-governing, on the basis either of independence or of autonomous association with other peoples within a state grouping of states.³³⁷

However, even this version of the proposals was not included in those submitted for discussion at the Dumbarton Oaks Conference, held between late August and late September 1944. This was apparently because they had been considered separately from the proposals for a general international organization.³³⁸ In the meantime, a study by the Office of Strategic Services noted that

While there is no official indication that the Atlantic Charter was intended as a document of "liberation" for colonial peoples, it has been so interpreted by the more advanced leaders of native movements in dependent areas . . . Liberals and leftists seek the application of the Charter to colonial areas for similar reasons.³³⁹

The study noted the opposite British view, with the qualification that, in any case,

British colonial native policies are not incompatible with the

335. Draft Declaration of Principles [Standards] Relating to Dependent Territories, June 6, 1944, *microformed on* CIS No. 1580, I.S.O. 28.

336. *Id.* In an exchange with Hornbeck, who urged that Secretary Hull's speeches emphasized self-government, Bowman said that he blamed the Secretary's advisers for that fact. *Id.* See also LOUIS, *supra* note 251, at 335-36.

337. Dependent Areas Policy Considerations, June 12, 1944, *microformed on* CIS No. 1580, I.S.O. 28; Status of Policy Papers Reviewed by Committee on Post-War Programs, July 19, 1944, *microformed on* CIS No. 1411, P.W.C. 269; Hooper, *supra* note 307, at 71-72, 81-82; Declaration of Principles Relating to Dependent Territories, April 13, 1944, *microformed on* CIS No. 158, I.S.O. 28. Peoples aspiring to self-government or to independence also had the duty to make every effort to prepare themselves for certain duties and responsibilities. *Id.*

338. The War and Navy Departments probably would have objected to their inclusion on the agenda, as they successfully did in relation to the trusteeship proposals. Hooper, *supra* note 307, at 83-87. See also THORNE, *supra* note 253, at 456-57.

339. Office of Strategic Standards, British and American Views on the Applicability of the Atlantic Charter to Dependent Areas (Particularly British Africa), Aug. 30, 1944, at 18, *microformed on* CIS No. 600, T. 529.

[Charter]. Because of this position the specific acceptance of the Charter as applying to Africa would probably not fundamentally alter the formal aspects of British policy. It would, however, presumably give additional strength to those who press for a colonial policy involving fundamental economic changes, social advancement and increasing large measures of political independence.³⁴⁰

It was therefore relatively easy for Pasvolsky, in a review dated October 12, after Dumbarton Oaks, to summarize American policy objectives as including "[a] set of basic principles should be proclaimed to make clear the responsibility which administering authorities have for . . . [both trust and colonial territories]."³⁴¹ However, as Pasvolsky pointed out to Russian Ambassador Gromyko on January 13, 1945, while trusteeship problems would be discussed at the forthcoming UNCIO, the colonial problems would probably be discussed later, at a special conference.³⁴² A few days later, on January 19, 1945, in a conversation with Pasvolsky and other officials, British Secretary of State Stanley noted that the British were still desirous of a general declaration of policy and standards, but waxed warmth on the idea of establishing regional commissions.³⁴³ Pasvolsky reiterated the American position on trust territories, the proposed declaration and regional commissions.³⁴⁴ The Declaration was among the topics suggested by the United States for discussion at the Yalta Conference between the Big Three in February 1945. However, no decision was taken on that topic, possibly due to Churchill's reluctance to discuss British colonial policy.³⁴⁵

A new Inter-Departmental Committee on Dependent Area Aspects of International Organization held its first meeting on February 2, 1945. Its members included representatives of the State, War, Navy and Interior Departments. Among the subjects it discussed was the Declaration, which was still in its June 1944 form. However, when the United States Delegation

340. *Id.* Compare the view expressed within the sub-committee dealing with International Security Organization (i.e., the future U.N.), that the preferred policy towards Africa should be the development of conditions that would prevent it from becoming the source of international friction or the springboard for attack against the Western Hemisphere and that would enable Africa to contribute increasingly to the maintenance of international peace and security and to the development of international economic relations. The United States could best safeguard these interests through exerting its influence to secure conditions consonant with the Four Freedoms and with the Atlantic Charter. This would best be achieved through promoting the economic, social and political advancement of dependent peoples. However, while the principle of international accountability should be recognized, along with Hull's statements on self-government, the United States did not seek to change the sovereignty or administrative controls of African independence. J.F. Green, *U.S. Strategic and Political Interests in the Dependent Territories of Africa*, microformed on CIS No. 1580, I.S.O. 229.

341. Hooper, *supra* note 307, at 89-90.

342. *Id.* at 92.

343. *Id.*

344. *Id.* at 95-96.

345. YALTA AND MALTA, FOREIGN REL. U.S. 858-59 (1945); LOUIS, *supra* note 251, at 456-59; SHERWOOD, *supra* note 209, at 865-66.

to UNCIO held its first meeting on March 13, 1945, Secretary Stettinius explained to Congressman Charles Easton that it would be possible in the discussion of trusteeship to include only arrangements concerning former League mandates and certain detached areas, but not the general issues.³⁴⁶ The only reference to the colonial question in the U.S. draft for the U.N. organization, was in Chapter II, containing the suggested Principles for the Organization, which included this sentence: "The development and well-being of the dependent peoples of the world shall be a proper concern of the organization."³⁴⁷ Within the Department, however, the idea of a draft Declaration was still kept alive. In its version of April 12, 1945, it was accompanied by a strong introduction, which noted that:

Americans are familiar with the usefulness of agreeing upon a statement of principles because they have before them the great example of the Declaration of Independence, which was in part a statement of certain bases and standard of good government . . . Though the Declaration of Independence has never had the force of law [it has] . . . had enormous influence not only on those who framed the Constitution of the United States but also on all who have been responsible for governing the country under the Constitution . . . It is in accordance with the American way of thinking to believe that a Declaration of Principles should be drawn up for dependent peoples.³⁴⁸

Eventually, it was the British and Australian Delegations at UNCIO which introduced the Declaration into the discussion in May, arguing that a broad statement of principles was necessary to make clear that trusteeship, which was also being discussed, was only one aspect of a wider problem. The key word used in the shortened American draft was self-government, and it provoked much debate. However, the American Delegation obtained an understanding in Committee II/4 that dependent peoples could progress from one stage to another until, when conditions warranted, they could apply for membership of the United Nations. Eventually, the draft which ultimately became Article 73 of the U.N. Charter, was accepted by the Committee on June 17 and by Commission II on June 20, 1945.³⁴⁹

In a speech to the Commission II, the British delegate, Cranbourne, stated that his government had never ruled out independence as a possible

346. Hooper, *supra* note 307, at 105-08.

347. Proposal for the Establishment of a General International Organization, Mar. 13, 1945, at 3, *microformed on* CIS No. 1580, I.S.O. 241.

348. Declaration Regarding Administration of Dependent Territories: Commentary, Apr. 12, 1945, *microformed on* CIS No. 1580, I.S.O. 273.

349. RUSSELL & MUTHER, *supra* note 211, at 808-23; William Runde, *Trusteeship During and After World War II* 152 (Ph.D. dissertation, 1975); 10 UNCIO Doc. 1115, at 1-2 (1945).

goal in appropriate cases.³⁵⁰ Furthermore, he noted, "Do not let us rule out independence as the ultimate destiny of some of these territories . . . But to have included it as the universal goal of colonial policy would, we believe, be unrealistic and prejudicial to peace and security."³⁵¹

Two weeks later, in his statement submitted for the Hearings on the United Nations Charter in the Senate Committee on Foreign Relations, Secretary Stettinius emphasized that "this pledge includes the right to independence for those peoples who aspire to it and are able to exercise its responsibility. That was the view of the United States delegation, and the Committee on Trusteeship at San Francisco unanimously concurred in that interpretation."³⁵²

C. Completion of Trusteeship Plan

During meetings of the Informal Political Agenda Group in the spring of 1944, Bowman expressed disinterest in an "elaborate scheme or code or set of rules" in the nature of a trusteeship program, instead preferring a broad statement of principles and the regional commission mechanism.³⁵³ However, Pasvolsky and several others still showed a general preference for trusteeship, in addition to any other schemes on which agreement was possible.³⁵⁴

According to paragraph A2 of the trusteeship plan of the "Tentative Proposals for a General International Organization," the basic objectives of the system were:

- (a) to promote, in accordance with the provisions of any declaration or code that may be agreed upon, the political, economic, and social advancement of the trust territories and their inhabitants and their progressive development toward self-government;
- (b) to provide non-discriminatory treatment in trust territories for appropriate activities of the nationals of all member states; and
- (c) to further international peace and security.³⁵⁵

According to the Departmental comment accompanying the text, creation of the system

350. 8 UNCIO Doc. 1144, at 22.

351. *Id.* RUSSELL & MUTHER, *supra* note 211, at 823-24; LOUIS, *supra* note 251, at 546-47; HOLBORN, *supra* note 214, at 576-77.

352. Statement, Hearings Before the Committee on Foreign Relations, U.S. Senate, 79th Cong., 1st Sess. (July 9, 1945).

353. Informal Political Agenda Group, International Organization Discussions, May 12, 1944, *microformed on* CIS No. 1702-57.

354. *Id.*

355. Trusteeship plan in Tentative Proposals for a General International Organization, May 19, 1944, *microformed on* CIS No. 860, P.I.O. 223.

would give recognition to the principle . . . that the age of imperialism is over, and that all peoples everywhere are to be encouraged and assisted to the end that they may govern and sustain themselves and assume their responsibilities as partners in the world community. Such a system, which would accord with the spirit of the Atlantic Charter . . . would provide a "yardstick" for all dependencies and would encourage higher standards of administration . . .

³⁵⁶

Although in March it had been decided by the Political Agenda Group not to submit the trusteeship plan to the British in a preliminary exchange of papers, on account of the unfavorable British attitude, it was fully expected that trusteeship would be on the agenda of the forthcoming Dumbarton Oaks Conversations. The main item which had been omitted was the fate of the Japanese mandated islands, about which the War and Navy Departments had been expressing concern since early June. However, the Joint Chiefs refused to sanction the draft plan approved on June 22, 1944, since it envisaged the possibility of control by the United Nations over Japanese territories. This was consistent with the policy prevailing in the Department and preferred by the President since 1943, but generally disapproved by the military authorities who preferred outright American sovereignty. During considerable subsequent discussion, the Joint Chiefs made clear their view that the issue was closely related to the broader subject of territorial settlements and military considerations that were connected with the entry of the Soviet Union into the war against Japan and with the relative military strength of the major powers upon conclusion of the war.³⁵⁷ Therefore, in deference to these views, the topic of trusteeship was not formally discussed at the Four-Power conversations at Dumbarton Oaks.³⁵⁸

Nevertheless, the question of trusteeship was informally raised by the Soviet, British and Chinese delegations, who made it clear that they wished to exchange views prior to discussion of any general principles or international machinery which might be proposed in conjunction with the organization being planned. The Department therefore continued its work in this area.³⁵⁹

356. *Id.*

357. Hooper, *supra* note 307, at 84.

358. Hooper, *supra* note 307, at 85; Department of State, Division of Political Studies, at 11, April 3, 1943, *microformed on* CIS No. 551-50; HULL, *supra* note 212, at 1596 & 1706-07; HALLETT ABEND, *PACIFIC CHARTER: OUR DESTINY IN ASIA* 218-19 (1943); LOUIS, *supra* note 251, at 69, 258-73, 362-72; RUSSELL & MUTHER, *supra* note 211, at 343-48.

359. Hooper, *supra* note 307, at 87-91; Fosdick, *Agreed-Upon Steps to be Taken Following Dumbarton Oaks*, Nov. 4, 1944, *microformed on* CIS No. 1580, I.S.O. 99; James Green, *Additional Machinery Required for International Trusteeship*, Nov. 18, 1944, *microformed on* CIS No. 1580, I.S.O. 143; *Proposals for the Establishment of a General International Organization—Tentative Recommendations of the Division of International Security and Organization*, Dec. 9, 1944, *microformed on* CIS No. 1508, I.S.O. 202.

January 1945 found the British riding fairly high. After a study of the issues late in 1944, they had set their sights against a trusteeship plan of the American variety, preferring instead the regional commission idea, on which Stanley and Pasvolsky had a thorough exchange of views on January 4, 1945.³⁶⁰ Stanley pressed home his views that administering territories, in addition to participating in proposed regional commissions for functional cooperation between administering and other powers, might agree to make reports to the General Assembly which, although it could discuss such reports, could not make recommendations or take enforcement action.³⁶¹ Neither could there be any inspection or visitation by outside authorities. Then, on January 19, 1945, in New York, he gave a well-reported address in which he lauded Britain's colonial achievements, and expressed objection to a universal charter on dependent territories, but indicated agreement to the objective of self-government and social and economic development within the Empire and to the regional commission idea as a mechanism for outside cooperation, advice and constructive and informed criticism.³⁶²

There is no evidence that the British were aware of the disagreements between State and the military Departments on the security question. On July 10, 1944, Roosevelt had guardedly expressed his preference for the State position that the United States should be trustee for the Japanese mandates, which they could protect and fortify.³⁶³ He had disagreed with the notion of assuming permanent sovereignty. Nevertheless, the two other Departments and the military chiefs adhered to their position, at the same time delaying with convening the Inter-Departmental Committee on Dependent Areas, approved by the President in November, until February 2, 1945. In the meantime, State strove to persuade the President of the desirability of devising a document on principles and procedures and that, while the system would include mandated territories and detached territories, specific territorial dispositions would be postponed until the end of hostilities. However, Secretary of War Stimson unsuccessfully tried to persuade Roosevelt to postpone any discussion of territorial issues, trusteeship or international organization.³⁶⁴

The British euphoria was short-lived. When the matter of trusteeship came up at the Yalta Conference on February 9, 1945, Churchill at first angrily exploded.³⁶⁵ However, faced with an assenting Stalin and with Secretary Stettinius' explanation that there was no desire to affect the British Empire, Churchill agreed to the inclusion of trusteeship in the UNCIO. The atmosphere favoring a trusteeship plan was further improved by the vocal

360. Hooper, *supra* note 307, at 94.

361. *Id.* at 97-98.

362. Hooper, *supra* note 207, at 97-98; HOLBORN, *supra* note 214, at 554-56; XXIX WEST AFRICA 107 (Feb. 10, 1945); *id.* at 133-34 (Feb. 17, 1945); LOUIS, *supra* note 251, at 463.

363. Hooper, *supra* note 307, at 101.

364. Hooper, *supra* note 307, at 105-06; RUSSELL & MUTHER, *supra* note 211, at 510-14.

365. LOUIS, *supra* note 251, at 456-59; SHERWOOD, *supra* note 209, at 865-66.

of sections of the public, as generally noted in Part V.³⁶⁶

The inter-Departmental deadlock about the wisdom of discussing trusteeship at all at San Francisco was finally broken when, in late February, Pasvolosky persuaded the members of the Inter-Departmental Committee that developments at and following Dumbarton Oaks compelled the United States either to discuss the topic or give reasons why it should not be discussed and that, tactically, the first solution was preferable.³⁶⁷ Wrangling within the Committee continued over the security issue and the military members' dislike of provisions on international standards of administration and rights of inspection and investigation in areas of strategic value to the United States. Eventually, on March 2, 1945, the Committee agreed to a draft which provided, *inter alia*, for strategic and non-strategic territories and for the Security Council of the proposed organization (with its veto institution) to have ultimate authority over strategic areas. This draft cleared the Secretary's Staff Committee on March 20. It was also approved by the Interior Department. However, the Secretaries of War and Navy, Stimson and Forrestal, desired outright annexation, continued to express objections during meetings with the other two Secretaries. On April 10, 1945, two days after Roosevelt died, the matter was only partially resolved, with the new President's approval in principle of Stettinius' position, stated in his memorandum of April 9, 1945 that "the United States would admit internal weakness if the government had no policy when the moment for action came . . ." ³⁶⁸ Eventually, the military Secretaries and Joint Chiefs agreed on compromise and the delegation to UNCIO finalized a much shortened draft on April 26, 1945. In it the United States made no public declaration of reserved rights in specific territories and the military objections to such matters as Security Council authority over strategic areas and inspection were satisfied.³⁶⁹

366. Hooper, *supra* note 307, at 103-05; NOTTER, *supra* note 316, at 660-61 (quoting letter of Dec. 20, 1944 from Stettinius to Forrestal); LOUIS, *supra* note 251, at 456-59; ANTHONY EDEN, *THE RECKONING* 595 (1965); SHERWOOD, *supra* note 209, at 865-66.

Further strong support came from such opinion-molders as: The Commission to Study the Organization of Peace, Dec. 11, 1944, and Feb. 20, 1945, *microformed on* CIS 860, P.I.O. 373 a distinguished group of citizens (including Quincy Wright, James Shotwell and A. Holcombe) in a mid-February letter to the editor of the *N.Y. Times*, (Feb. 19, 1945), and former Under Secretary and now private citizen Welles, in a powerful letter published in the *N.Y. Herald Tribune* in late March. See generally *N.Y. HERALD TRIBUNE*, Mar. 28, 1945. Welles noted that the San Francisco Conference would offer the opportunity to write a resounding conclusion to the Atlantic Charter and stressed that the worldwide clamor for liberty had taken on the tinge of religious fanaticism, especially noting Japan's unforgettable successes against the West in the early stages of the war, which might lead to catastrophe unless satisfied.

367. Hooper, *supra* note 307, at 102-04 & 106.

368. RUSSELL & MUTHER, *supra* note 211, at 586-87.

369. Hooper, *supra* note 307, at 100-03, 105-06, 108-15; NOTTER, *supra* note 316, at 388-89, 428-34; UNCIO, Meeting of the United States Delegation, May 9, 1945, *microformed on* CIS No. 1930-34; *id.* at April 17, 1945, *microformed on* 1930-1 to 1930-79; *id.* at April 18, 1945, *microformed on* CIS No. 1930-12; *id.* at Apr. 26, 1945, *microformed on* CIS No. 1930-19; RUSSELL & MUTHER, *supra* note 211, at 576-89; LOUIS, *supra* note 251, at 476-95; THORNE, *supra* note 253, at 598-600; Haas, *supra* note 238, at 5-10.

At San Francisco, Committee II/4 received full proposals on the Declaration and on trusteeship from the four Sponsoring Powers—China, Great Britain, Russia and the United States—and from Australia and France. There were also several less comprehensive proposals by others. All followed the American pattern, itself largely based on the draft of June, 1944. Eventually, after consultation with other delegations, the Committee accepted as a working paper, a draft submitted on May 17, 1945 by Commander Stassen, the head of the American Delegation. On the trusteeship issues, one of the major questions which provoked debate was that of strategic territories, the American position ultimately being accepted, probably because it was clear that it was not an area where compromise was possible.³⁷⁰ Australia and the Philippines also sought to have inserted provisions that all dependent territories would be covered without any need for consent by the metropolitan power,³⁷¹ however, this was dropped at an early stage. Egypt also moved to delete the provision, in what became Articles 75 and 77 of the U.N. Charter, for territories to come under trusteeship by subsequent agreements.³⁷² This was firmly opposed by the United States, Great Britain, France, the Netherlands and South Africa.³⁷³

The biggest problem-area was the objectives of the system. The initial American position in early May was the same as in the previous spring, "to promote . . . the . . . advancement of the trust territories and their inhabitants and their progressive development toward self-government. . ."³⁷⁴ The Chinese delegate, seconded by the Russian, proposed that the wording should be "to promote development towards independence or self-government, as may be appropriate for the circumstances of each territory and its people."³⁷⁵ After a sharp debate, it had been agreed that Stassen would confer with the Chinese delegate and others who had taken part in the debate. During consultations between the four Sponsoring Powers on June 1, 1945, the Russian delegate noted that the original Russian version had provided for full national independence and that its support of language which excluded this phrase was a concession. He later indicated that language referring to the wishes of the people would be acceptable.³⁷⁶ Stassen suggested the phraseology "and their progressive and freely chosen development towards self-government or independence as may be appropriate to the circumstances."³⁷⁷ This phraseology, which differed from the Chinese mainly in reversing the order of independence and self-government

370. Huntington Gilchrist, *Colonial Questions at the San Francisco Conference*, 39 AM. POL. SCI. REV. 984-85 (1945).

371. RUSSELL & MUTHER, *supra* note 211, at 825.

372. *Id.*

373. *Id.* at 825-26 and 836; see also Gilchrist, *supra* note 370, at 984-85.

374. RUSSELL & MUTHER, *supra* note 211, at 831.

375. UNCIO, Summary Report of the 6th Meeting of Committee II, May 17, 1945, at 452-54.

376. UNCIO, Summary Report of 13th Meeting of Committee II, June 8, 1945, at 513-14.

377. *Id.*

and adding the adjective progressive in front of development, was not acceptable to the Russian and the British delegates.

By June 5, 1945, the language being privately discussed by the American Delegation was:

to promote the political, economic, social inhabitants, and their and educational advancement of the trust territories and their progressive development toward self-government or independence as may be appropriate to the particular circumstances each territory and of its peoples (and to the (freely expressed) wishes of the people concerned, and as may be provided by the trusteeship agreements).³⁷⁸

The remarkable thing about the new language was that much of it was taken from the Third Point of the Atlantic Charter. As a matter of fact, the Delegation decided that it should urge adoption of the language of the Atlantic Charter.³⁷⁹ Stassen noted that, in the light of the positions Churchill and Roosevelt had expressed on the Atlantic Charter's coverage, it would be difficult for the Delegation to defend any language not as strong as the Atlantic Charter. At the same time, it would be thereby possible to defeat any Russian attempt to have stronger language adopted. He also noted that the Atlantic Charter language would not be as provocative as new language. On June 8, 1945, the Sponsoring Powers and France agreed to the language, which was approved by Committee II/4 the same evening, after rejection of an Egyptian proposal to delete the words "and as may be provided by the terms of each trusteeship agreement."³⁸⁰ This language ultimately became Article 76(b) of the U.N. Charter.³⁸¹

D. Reasons for the Eventual Convergence Of Allied Views

In 1953 Haas asserted that

neither a progressive spirit of disinterestedness nor a strong humanitarianism can claim sole credit for the acceptance of the Trusteeship system in 1945 . . . International trusteeship in 1919 owed its acceptance to the necessity of finding a compromise solution to a series of clashing colonial policy motivations. It owed

378. UNCIO, Meeting of the United States Delegation, at 7, June 5, 1945, *microformed on* CIS No. 1930-64.

379. *Id.*

380. *Id.*

381. Progress Report on Work in Commissions and Committees, U.S. Gen. 135, meetings of May 16 & 17, 1945, *microformed on* CIS No. 2182-8; Preliminary Consultations on Trusteeship of the Five Powers, 8th meeting, June 1, 1945, *microformed on* CIS No. 1916-4; UNCIO, Meetings of the United States Delegation, June 5, 1945, *microformed on* CIS No. 1930-64; RUSSELL & MUTHER, *supra* note 211, at 830-36.

its continuation in 1945 to precisely the same kind of situation

³⁸²

However, "the motivations had changed not only in content but . . . in terms of the groups now identified with them."³⁸³ According to Haas, the protagonists of a colonial New Deal were affiliated with the "new Asian and Arab states and with [the] Latin American"³⁸⁴ states at San Francisco. Those protagonists were at first supported by liberal opinion in the United States. However, Haas stated, liberal opinion at the governmental level had slackened by 1945 under a different type of motivation, while some groups saw the colonial New Deal as a means of "acquiring strategic bases without seeming to resort to renewed imperial expansion."³⁸⁵ According to Haas, these groups included Roosevelt and the governments of Australia and New Zealand and, probably, the Soviet Union. Support also came from the free traders, symbolized by Hull, who saw in trusteeship over all colonies a way to combat protectionism. In fact, Haas apparently saw the U.N. Charter provisions as a synthesis of clashing aims, including the fears of colonial powers of losing control and of actual harm to the "development of colonies toward self-government and free economic association with the metropolitan country,"³⁸⁶ which were met by the limited nature of the trusteeship provisions, the intact condition of colonial empires after UNCIO and the concessions on strategic trusteeship.³⁸⁷

However, it is submitted that, whether of a liberal or conservative variety, and whether its proponents articulated views for or against what became the Declaration Regarding Non-Self-Governing Territories and the trusteeship provisions, the Atlantic Charter and Humanitarian Universalism were vital factors in the plans as they evolved during 1942-1945.³⁸⁸ This can also be seen in the successive drafts of the Declaration, with its statement of social, economic and welfare concerns.³⁸⁹ It is also evident in the mid-1944 version of the trusteeship scheme, as well as Articles 76, 77 and 78 of the U.N. Charter which, under the influence of the 1944 draft, provided for social, economic, welfare and human rights objectives and for a system of reporting, petitions and visitation.³⁹⁰ Humanitarian Universalism was also

382. Haas, *supra* note 238, at 18.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.* at 19.

388. *See supra* notes 301-77; *see infra* note 390.

389. *See supra* note 307-40.

390. Of course, individual officials had problems with aspects of the plans, *e.g.*, Bowman objected to portions of the April 1944 version of the Declaration stating the obligation of administering authorities to assist dependent peoples to become qualified for and secure employment in all occupations and professions and the need for such authorities to recognize their responsibility to promote adequately remunerated employment, to improve working

eminently evident in the efforts of Australia and New Zealand to improve conditions in the dependent territories of the Pacific by implementing the Atlantic Charter, as exemplified in public pronouncements shortly after the Charter's publication and in the 1944 Australia and New Zealand Agreement.³⁹¹

Even the military officials and Departments, in pressing their security concerns, never resisted this goal. Neither did the free traders. In fact, many advocates of Empire often articulated concern about human rights and welfare during the period in question. The very efforts of the British government between 1943 and 1945 to obtain agreement on regional commissions is evidence of this phenomenon, even if these efforts were not entirely spontaneous, as with the Colonial Development and Welfare Act of 1940, which it had been alleged, had been introduced as a bribe to the colonies consequent to Dunkirk.³⁹² But there were genuine humanitarians, such as Lord Hailey, within British government circles.³⁹³ Besides, the pressure of external forces, especially the war itself and the passions it unleashed in the colonies and America, led to some new and genuine intentions—what Louis calls “a moral regeneration of British purpose in the colonial world.”³⁹⁴ Hence, it is noteworthy that the Colonial Development and Welfare Act of 1945 was much more generous than the 1940 Act.³⁹⁵

conditions, to assure freedom of association and to provide social insurance and social services: Informal Political Agenda Group, International Organization Minutes, June 2, 1944, *microformed on CIS No. 1702-60*.

391. HOLBORN, *supra* note 214, at 645, 648; W. Nash (Deputy Prime Minister of New Zealand), Speech before the International Students Assembly, Washington, D.C., Sep. 3, 1942; HOLBORN, *supra* note 214, at 333-37; Herbert Evatt (Attorney General and Minister of External Affairs) Statement Before the House of Representatives, Sep. 3, 1942, at 320-23; Kitt Bailey, *Dependent Areas in the Pacific*, 24 FOREIGN AFF. 494-98 (Apr. 1946); THORNE, *supra* note 253, at 601-02.

Section 28 of the January 1944 agreement provided that the two governments declared that in applying the principles of the Atlantic Charter to the Pacific, the doctrine of trusteeship (already applicable in the case of the mandated territories of which the two Governments were mandatory powers) was applicable in broad principle to colonial territories in the Pacific and elsewhere, and that the main purpose of the trust was the welfare of the native peoples and their social, economic and political development.

392. Editorial, *Colonial Development*, 167 THE AFRICAN WORLD 126 (1944) (quoting a rebuttal by Stanley).

393. Hailey, a retired Governor of the Punjab and the United Provinces in India and member of the House of Lords, was the semi-official director of research at the Colonial Office and a key figure on colonial questions. LOUIS, *supra* note 251, at 10. His views were generally balanced and welfare-oriented. See, e.g., Rt. Hon. Lord Hailey, *International Aspects of the Future of Africa*, 42 J. ROYAL AFR. SOC. 108, 116-17 (July 1943); Rt. Hon. Lord Hailey, *The Colonies and the Atlantic Charter*, 30 J. ROYAL AFR. SOC. 233 (Sept. 1943).

394. Louis, *supra* note 251, at 103.

395. Louis & Robinson, *The United States and the Liquidation of British Empire in Tropical Empire, 1941-1951*, in GIFFORD & LOUIS, *supra* note 271, at 38-40. The 1940 Act remitted £11 million of the total of £15 million of debt owed by colonial governments to the British Exchequer and authorized development assistance of up to £5 million per year for grants or loans and £1/2 million annually for research over a 10-year period. Much of the money was never appropriated. The 1945 Act, drafted in 1944, provided for a total of £120 million for the years 1945-56: Editorial, *supra* note 392, at 126; Rt. Hon. Lord Hailey, 168 J. ROYAL AFR. SOC.

Above all, one can detect a sense of commitment.

Even in the politico-constitutional aspects of British,³⁹⁶ Dutch³⁹⁷ and,

108-18 (July 1943); LOUIS, *supra* note 251, at 100-03; THORNE, *supra* note 253, at 210-12, 708-09.

396. Amery, the Secretary of State for India and Burma, had written Churchill expressing the desire for a public statement indicating that the Atlantic Charter applied primarily to those nations with whom Britain was at war or whom she intended to liberate, but that its spirit was the one animating British colonial policy, namely the development of self-governing institutions to the fullest extent within the Empire. In Cabinet discussions in early September, 1941, Amery had suggested that a statement qualifying self-government "would send both India and Burma right off the deep end . . ." and Churchill had apparently agreed. REYNOLDS, *supra* note 208, at 289; 374 PARL. DEB.-COMMONS 374 (1940-1941); LOUIS, *supra* note 251, at 126-30; WINSTON CHURCHILL, UNRELENTING STRUGGLE 246, 248 (1942).

Therefore, Churchill's House of Commons statement might, surprisingly, have been represented a considerable compromise. LOUIS, *supra* note 251, at 131-33; 374 PARL. DEB.-COMMONS 376 (1941-42); W. Arnold-Foster, *The Atlantic Charter*, 14 POL. Q. 148-49 (Apr.-June 1942).

One therefore finds instructive an 1944 editorial in *The London Times*, urging the need to balance the Atlantic Charter's self-determination principle with freedom from want and fear and noting that

It is . . . an essential quality of all political principles that they cannot be applied absolutely and automatically; and this quality attaches to the principles enshrined in the . . . Charter. But this does not mean that the principles are invalid . . . No does the impracticality of an unqualified application of the principles of the Charter . . . provide a reason for rejecting them altogether. . . What disturbed public opinion is an utterance of the PRIME MINISTER about India shortly after the promulgation of the Charter was not what he probably intended to say—namely, that the Charter could not be taken to require the immediate departure of the British from India, but he appeared at first to say—namely, that the charter had no application to India at all.

Editorial, *THE LONDON TIMES*, Mar. 20, 1944.

Throughout, British government representatives publicly stressed the consistency of their policy of gradual evolution with the Atlantic Charter, and the Labour members of the wartime coalition were at pains to stress solidarity with the colonial peoples' claim of Atlantic Charter application. Cranbourne in House of Lords, Dec. 3, 1942, reprinted in HOLBORN, *supra* note 214, at 271-72; JOHN SBREGA, *ANGLO-AMERICAN RELATIONS AND COLONIALISM IN EAST ASIA 1941-1945*, 19-26 (1983); *British Colonial Policy—The Colonial Secretary's New York Address*, XXIX WEST AFRICA 107 (Feb. 10, 1945) & 133-34 (Feb. 17, 1945); Speech of Clement Atlee, Leader of the Labour Party, Nov. 8, 1939, reprinted in HOLBORN, *supra* note 214, at 671-73; SBREGA, *supra*, at 18. In 1943 the Labor Party's position was reaffirmed, in a diluted manner, with an undertaking to seek "the abolition of colonial status" and a commitment to make the terms of the Atlantic Charter and the Four Freedoms "active principles in colonial administration" for "backward" territories; DAVID GOLDSWORTHY, *COLONIAL ISSUES IN BRITISH POLITICS*, 1945-1961, 120-26 (1971).

It is often forgotten, too, that the intemperate remarks of the Prime Minister of a country with a system of parliamentary sovereignty (not executive sovereignty) must be sometimes taken with caution.

397. In 1942, the Netherlands made it clear that their East Indies were not regarded as a colony but as an integral part of the Kingdom. In December, Queen Wilhelmina announced that the union between the Kingdom and the Indies would be reconstructed "on the solid foundation of complete partnership" and there would be an emphasis on "natural evolution" of all parts in a Commonwealth whose parts would be internally self-reliant, with "freedom of conduct." News Report, 157 GT. BRIT. & E. 10 (Nov. 22, 1941); Eelcon van Klefens, *The Democratic Future of the Netherlands Indies*, 21 FOREIGN AFF. 87-102 (Oct. 1942); John Uhler, *The Atlantic Charter as a Menace to Peace*, 157 CATHOLIC WORLD 460, 462 (Aug. 1943); LOUIS, *supra* note 251, at 29-30; Charles Taussig, *A Four-Power Program in the Caribbean*, 24 FOREIGN AFF. 699, 707 (July 1946); OFUATEY-KUDJOE, *supra* note 25, at 101-02.

to a much lesser extent, French colonial policy,³⁹⁸ there was some evidence of a new attitude. While it might have had significant elements of expediency and might have reflected psychological changes, including a feeling of dependence on the United States, it also reflected compliance with the Atlantic Charter, humanitarianism and a determination, in trying times, to keep from the door possible additional wolves in the colonies. Thus, open preparations for their freedom were made.³⁹⁹

Of course this did not imply any real willingness to rush into granting independence to the colonies. Nevertheless, the improved development and welfare were accompanied by constitutional changes giving greater local participation in government. Thus, with reference to the British empire during the war,

Ceylon and Jamaica, two of the most 'mature' colonies, with long records of aspiration to self-rule, received adult suffrage; Malta was promised the same; and in the Gold Coast provision was made for an African unofficial majority in the legislature. Lesser modifications elsewhere were also made in the same traditional spirit of cautious devolution.⁴⁰⁰

The policy of cautious devolution was expressed, as early as November, 1941, by Halifax in a memorandum to Welles. It requested the United States government to do what it might to be helpful from the British standpoint

398. On November 8, 1941, the Governor-General in French West Africa announced a new policy in which France sought to introduce principles of administration which were more enlightened and humanitarian than previously. M'Bokolo, *French Colonial Policy in Equatorial Africa in the 1940's and 1950's*, in GIFFORD & LOUIS, *supra* note 271, at 176-90; P.O. Lapie, *The New Colonial Policy of France*, 23 FOREIGN AFF. 104-11 (Oct. 1944). Nevertheless, at the French African Brazzaville Conference of Jan.-Feb., 1944, there were signs of French readiness to improve economic and social conditions in the colonies and to create conditions for eventual limited self-government: LOUIS, *supra* note 251, at 43-47; HOLBORN, *supra* note 214, at 864-65.

399. Louis & Robinson, *supra* note 395, at 47-55.

400. GOLDSWORTHY, *supra* note 396, at 12-13; SIR CHARLES JEFFRIES, *CEYLON: THE PATH TO INDEPENDENCE* 84-92 (1963). Hargreaves sees this incipient trend of devolution in West Africa as a conscious effort to restore, through enforced devolution, Britain's strategic and economic interests in the postwar world, especially since the colonies had become more important economically and strategically: Hargreaves, *Towards the Transfer of Power in British West Africa*, in GIFFORD & LOUIS, *supra* note 271, at 117-40. As a matter of fact, according to a British paper, the Gold Coast, constitutional developments were criticized by many who intimately knew the Gold Coast as premature, due to the insufficient advance of the people as a whole: Editorial, *Turning Point in the Gold Coast*, 169 THE AFRICAN WORLD 94 (Nov. 11, 1944). A few weeks later, the paper defended the appointment of a new Resident Minister for West Africa against the criticism that the African war effort had ceased to be important, on the ground that such an "integrated effort" was "needed for colonial development in the ordinary way;" *id.* at 147. Worthy of consideration in this context, also, is the announcement, in March 1945, of a new constitution for Nigeria, whereby a modest step would be taken towards unofficial majorities (mostly nominated by the Governor) in the legislative and regional councils, 170 THE AFRICAN WORLD 156-57 (Mar. 10, 1945). Likewise, the new draft constitution for Trinidad and Tobago, providing for universal adult suffrage without an English language requirement, was announced in July, 1945; 15(2) CROWN COLONIST 500, 508 (July 1945).

during the course of the Burmese Prime Minister's visit⁴⁰¹ beginning the next day, since they had given "the fullest guarantees . . . that their policy is to promote [Burma's] attainment of Dominion status"⁴⁰² even though they had been unable to give U Saw the promise of the immediate establishment of full self-government at that time. According to the memorandum: "The development of self-government in the component parts of the British Commonwealth of Nations is in complete accord with the principles laid down in the third point of the Atlantic Charter."⁴⁰³

Likewise, despite Churchill's earlier equivocal statements, Amery, the Secretary of State for India, said in December 1943 that "Britain's policy [for India] . . . past, present and future is guided by the principles of the Atlantic Charter."⁴⁰⁴ He reaffirmed his government's intention to encourage self-government as soon as an appropriate constitution could insure Indians against anarchy and civil war. "In all this we are definitely carrying out—indeed we anticipated—the principles of the Atlantic Charter."⁴⁰⁵

The very fact of such a larger-scale war undoubtedly was a catalyst for many of the changes in colonial policy. So were individual events of the war. But, unlike Wilson's Fourteen Points, the Atlantic Charter came early in the war, before American entry. It clearly was a vehicle for change, making a significant impact on global elites, providing a sense of obligation and purpose, and a reference point for influential planners and statesmen.⁴⁰⁶

VII. THE ATLANTIC CHARTER'S JURIDICAL STATUS

A. *They Fought For It*

In this assessment of the juridical status of the Atlantic Charter, the focus will largely be on aspects of international law relating to sources of law, mainly customs and treaties. Attention will be devoted to the extraordinary

401. Welles memo, Nov. 12, 1941, with Halifax memo, *see supra* notes 257-58.

402. *Id.*

403. *Id.*

404. *Britain's Policy For India*, report of United Press interview of Dec. 8, 1943, IV U.N. REV. 23 (Jan. 15, 1944).

405. *Id.*

406. *See* 4 COLONIALISM IN AFRICA 1870-1960, 525, 527 (Peter Duigan & L.H. Gahn eds., 1975). In an undated memorandum written between May and June, 1945, during the height of negotiations over the colonial provisions of the U.N. Charter, R. Bunche provided Stassen with the versions of the Draft Declaration given to the British at Quebec in August 1943, Moscow in October 1943 and London in April 1944. Noting that British objections were lodged on each occasion, he said that it represented the "background of Department policy on the current issue of independence, as made known to other governments on the occasions mentioned." Throughout the document, the word "independence" is underlined. Preceding Bunche's memorandum is a one-page summary of statements by Roosevelt and Churchill on the application of the Atlantic Charter and its colonial implications. Memorandum from Ralph J. Bunche to Stassen, May 24, 1945, *microformed on* CIS No. 2120-2.

range of wartime activity by Allied state organs and functionaries relating to self-determination. The reader should note that similar energy was expended in such areas as human rights, formal economic equality (liberalism and non-discrimination), social welfare and substantive economic equality (national and individual).⁴⁰⁷

Before commencing, it is important to reflect about the overwhelming reactions to the Atlantic Charter, including reliance upon it by the public in every part of the world. These occurred when the world was undergoing a blood bath and mankind's very *raison d'être* was being challenged and possibly redefined in an unprecedented cataclysmic struggle. Public opinion assumed the utmost importance since the Allies wished to retain the loyalty of hundreds of millions of individuals in a time of utmost need.⁴⁰⁸

It is fitting to note such contemporary views as that of the Greek Minister of Information in 1942, that Roosevelt and Churchill had "rendered a signal service to humanity when, at a timely moment, they signed the historic Atlantic Charter and laid the broad foundation of eventual international agreement."⁴⁰⁹ Equally pertinent is the view of the former Prime Minister of New Zealand that "[t]he principles of the Atlantic Charter are not platitudes, nor meant to be platitudes. They are principles that must be honored because thousands have died for them."⁴¹⁰ Even more vivid was New York City Mayor La Guardia's assertion that

The Atlantic Charter is not a harlot to be enticed by rhyming jingles and a bottle of eau de cologne. [It] is a Charter for a new world. It is . . . something that the people of the world earned; something for which millions of men have already died; something for which millions of people are living . . .⁴¹¹

Robert Sherwood's conclusions are therefore defensible.

The Atlantic Charter . . . turned out to be incalculably more powerful an instrument than the . . . British Government intended it to be when they first proposed it . . . [Its] effect was cosmic and historic. The British learned that when you state a moral principle, you are stuck with it, no matter how many fingers you may have crossed at the moment . . .⁴¹²

407. See *supra* notes 121-43.

408. "During World War II, self-determination became one of the principles for which the allies avowedly fought." JOHNSON, *supra* note 20, at 37.

409. A. Michalopoulos, *Address to the American Academy of Political and Social Science*, Nov. 16, 1942, in HOLBORN, *supra* note 214, at 543.

410. Fraser, *Address to the Canadian Senate and House*, June 30, 1944, in HOLBORN, *supra* note 214.

411. Fiorello La Guardia, Lincoln's Day Address, V POLISH REV. 3, 5 (1945).

412. SHERWOOD, *supra* note 209, at 362-63.

In this context, the following observation of a key State Department and UNCIO insider might have masked a view that the Atlantic Charter might have unleashed irresistible forces:

Perhaps the soundest basis for hope that the community of the [U.N.] will not fail in its responsibility toward the dependent peoples, who have contributed so greatly to the common victory, is to be found in the growing realization in a war-torn and war-weary world that the best guaranty of world security is a world of free, self-respecting, and prosperous peoples.⁴¹³

B. *The Atlantic Charter's Principles As Customary International Law*

1. Juristic Opinion, 1941-1945

In assessing whether the principles in the Atlantic Charter constitute customary international law, this article will now review juristic opinion and the actual state practice which this research has unearthed. Contemporary writers generally discussed issues relating to the possible status of the Atlantic Charter in a conventional law view. The opinions of the few whose writing might be taken as addressing customary law matters seem, at best, to be cautious. Thus, in 1943 Julius Stone said that “[i]n international law [the Charter] may or may not be technically binding depending on very difficult questions . . .”⁴¹⁴ and argued it was “clear that it is morally binding upon all the State parties and adherents, and that the conformity or not of their attitudes to the principles of the Charter will be political and diplomatic factors of importance.”⁴¹⁵

Of some interest is Fenwick’s discussion of the United States’ efforts to establish trade agreements since 1934. He noted that “[t]he first announcement of new economic principle came with the Atlantic Charter, subsequently incorporated into the Declaration by United Nations . . .”⁴¹⁶ He then quoted from the Fourth and Fifth Points, and noted, “The Charter thus represents the recognition that the welfare of the individual human being, over and above the boundaries of states has become the object of international law. Compare the “Four Freedoms” . . . The third is freedom from want . . . everywhere in the world.”⁴¹⁷

On the other hand, Hyde was more cautious in his 1945 textbook where, in looking towards the future, he referred to the Sixth and Eighth Points, regarding freedom from fear and want and the regulation of the use of force

413. Bunche, *supra* note 142, at 1044.

414. JULIUS STONE, *THE ATLANTIC CHARTER—NEW WORLDS FOR OLD* 146, 148 (1943).

415. *Id.*

416. FENWICK, *supra* note 140, at 500-01.

417. *Id.* at n.81.

through a future organization. He noted that it was now necessary for the United States to set its course and exercise its influence.⁴¹⁸ A centralized system would increase confidence of the lesser states in the larger ones and renew faith in the Atlantic Charter.⁴¹⁹

More affirmative was Ciechanowski who admitting that the Atlantic Charter was not strictly a treaty, urged that it was more than a political declaration since, "in its provisions and in its legal scope, it occupied a position closely approaching that of the Monroe Doctrine."⁴²⁰ In fact, the first three Points constituted a restatement of international law, since they confirmed, in effect, the principles of the Litvinov Protocol of 1929 and the 1933 London Declaration on the definition of aggression.⁴²¹ More importantly, he argued that these Points reaffirmed the commonly accepted juridical postulate that no act which is *contra bonos mores*, can be regarded as legally just because it violates the commonly accepted principles of international ethics.⁴²² The three Points were therefore "legally binding on the United Nations who [had] subscribed to them" in the Declaration By United Nations.⁴²³

Another endorsement came from the New York County Lawyers Association's Committee on International Law which, in a 1945 report, submitted to UNCIO and others, noted that "all the United Nations agreed to a limited but permanent set of rules or reasonable conduct and justice between nations known as the Atlantic Charter." They urged that the Charter should be applied by the World Court as "Supreme Law."⁴²⁴

2. Juristic Opinion, 1945-1991

Of the writers covered in our doctrinal survey, only Magarasevic appears to have addressed this issue, somewhat indirectly saying that the Atlantic Charter, the Declaration of the sic United Nations and the U.N. Charter represent international documents by which the right to self-determination became a positive principle of international law.⁴²⁵

418. HYDE, *supra* note 36, at 2424.

419. *Id.* The full text of the Charter appears at 2424-25.

420. STONE, *supra* note 414, at 146, 148; Jan Ciechanowski, *The Atlantic Charter and the Monroe Doctrine*, I POLISH REV. 3, 10, 15 (1945).

421. Ciechanowski, *supra* note 420, at 10-15.

422. *See generally id.*

423. *Id.*

424. N.Y. County Lawyers Association, *Committee on International Law*, in N.Y. COUNTY LAWYERS ASSOCIATION, *WORLD COURT APPLYING ATLANTIC CHARTER AS SUPREME LAW* (1945).

425. Magarasevic, *supra* note 44, at 31.

3. State practice

Recalling Judge Amoun's comment about the undesirability of past writers exerting a hold on the future,⁴²⁶ one must recall that actual state practice is the essence of custom unlike juristic opinion, it is an actual formal source of international law. The products of legal archeology of the type studied in this article should therefore be seriously considered in the quest to discover rules or principles of law.

As suggested above, the universal claims by non-state and non-governmental leaders of political and other public opinion, surveyed in Part V, have relevance as some of the raw materials to which governments were reacting during the period 1941-1945.⁴²⁷ It is logical to assume that juridically significant government decisions, state practice and *opinio juris* were developed by the United States and its allies in direct proportion to the volume and intensity of the pressure of that public opinion. In fact, the probability is very high that the cataclysmic nature of the attendant crisis and those preceding the war, enlarged the impact of that public opinion, thus attitudinizing the governmental decision-makers. One might also hypothesize that in the circumstances of the time and recalling the propositions about international law in a transitional or sovereignty-hiatus content,⁴²⁸ the simultaneous demands and claims of vast numbers of unfree global elites and masses, constituted autonomous congeries of direct stimulants to state practice or *opinio juris*.⁴²⁹

On a more traditional note, statements above show U.S. compliance with the Atlantic Charter and a firm desire that other states should observe the Charter as well. The gravity and seriousness of these assertions cannot be overstated, and their consistency with an American *opinio juris* is patent. Furthermore, it seems permissible to suggest that the vast wartime United States activity of post-war planning, including the work on trusteeship and the Declaration on National Independence, constituted repeated instance of an *opinio juris* on the globally binding nature of the principles within the Atlantic Charter.⁴³⁰ During the war, this activity was highly classified, but

426. Namibia, *supra* note 4.

427. *See* section A, part VII.

428. *See supra* notes 4, 5.

429. Judge Amoun's remarks should be recalled. *See supra* note 4.

430. The vast Notter files at the U.S. Archives are replete with materials commanding such a conclusion in the areas of international security, international organization, international economic institutions, human rights, social welfare, formal economic equality, substantive economic equality and general cooperation. Examples of this are statements about the American policies or proto-policies: to make no commitments with regard to postwar frontiers based on violations of the Atlantic Charter; to sanction relinquishment of full governmental powers over liberated and enemy territories only to such regimes as accepted "the principles of the Atlantic Charter. . . and the obligation to put them into effect;" to delay adoption of the recommendations of the Special Committee on Telecommunications, in relation to the Western Hemisphere, until they had been subjected to careful examination in relation to the policies enunciated, inter

we are at liberty to refer to and induce the proper legal conclusions after the fact. Numerous public statements by government officials and others seem to point in the same direction. These include Roosevelt's statement on the Charter's first anniversary, proclaiming that the United Nations, "bound together by the universal ideals of the Atlantic Charter,"⁴³¹ had signed the Declaration by the United Nations. In his memoirs, Hull noted in relation to the 1942 Declaration, that it had been his intention to bring the Allies "to the acceptance of certain principles already stated in the Atlantic Charter."⁴³² Of the utmost interest is the fact that many of these statements were classified. Under the cloak of government secrecy and non-disclosure, officials will often speak their minds and reveal their government's true beliefs.

American commentators sometimes went further than the public utterances of government officials. One noted that "[f]or the transition to peace, and for the peace itself, it is important that [in the latter Declaration, the anti-Axis nations] have acknowledged acceptance of the Atlantic Charter as a 'common program of purposes and principles'."⁴³³ Her view was that the fact that the Declaration had not been specifically approved by Congress did not invalidate it as a war pledge, due to the constitutional authority of the President. In February 1945, another writer urged that proponents of the views that the Atlantic Charter was never meant to be binding nor was it ratified after Pearl Harbor both the Atlantic Charter and the Four Freedoms were officially adopted as the war aims of the United Nations.⁴³⁴ In April, an editorial comment in the *American Journal of International Law* similarly agreed that the Atlantic Charter "may no longer be regarded as a scrap of paper signed and uncertain in content and purpose . . . [since] at the Crimea Conference . . . the . . . Great Powers again put their stamp of approval on and gave new life to the strained and faltering instrument."⁴³⁵ These reaffirmations, he said, were "merely reiterations of prior pronouncements

alia, in the Atlantic Charter and Article VII of the Lend-Lease, Observations on the Regional Telecommunications System Proposed by the Regional Subcommittee of the Special Committee on Communications, Oct. 13, 1943, *microformed on* CIS No. 810-190. *See also* Woolsey, Editorial Comment, *Poland at Yalta and Dumbarton Oaks*, 39 AM. J. INT'L L. 295-96 (Apr. 1945); Note also the comments that the United States is obligated (in so far as the President can obligate the nation through such a statement) to place its full strength behind every effort to see that the principles are achieved when the war has ended. Harley Notter, *Comment on the Atlantic Charter Joint Declaration of President Roosevelt and Prime Minister Churchill to Mr. Pasvolsky*, Sep. 11, 1941, *microformed on* CIS No. 131-1130.

431. Franklin D. Roosevelt, *Statement on the Anniversary of the United Nations*, III U.N. REV. 45 (No. 2, Feb. 15, 1943).

432. HULL, *supra* note 212, at 1116.

433. Esther Brunnauer, *The United States in Transition to World Order, Commission to Study the Organization of Peace Second Report and Papers*, 379 INT'L COUN. 259 (1942)

434. Hallet Abend, *Reviving the Charter*, 24 SIGN 353 (1945).

435. Woolsey, *supra* note 430, at 296 (Russia and others bound by Atlantic Charter, e.g., in relation to Poland).

of a similar kind . . . ,”⁴³⁶ such as the Inter-Allied meeting of September 1941, the 1942 Declaration and the 1942 British-Soviet Treaty. In that same month the *New York Times* stated that on January 1, 1942, “all of the United Nations [had] agreed to a limited but permanent set of rules of reasonable conduct and justice . . . known as the Atlantic Charter.”⁴³⁷

In Part VI there are reported a few instances of public statements by British and other Commonwealth officials indicating their government’s commitment to the Atlantic Charter. The Australia and New Zealand Agreement will also be recalled.⁴³⁸ These, and the actual changes in colonial policy by Great Britain, the Netherlands and France are somewhat consistent with *opinion iuris* favoring the legally binding status of the principles within the Atlantic Charter.

Interestingly, it is in assertions by British Ministers that their government was not violating the Atlantic Charter, *e.g.*, in relation to Burma and India, that one might infer their tacit acceptance of Britain’s commitment to that instrument, possibly as a matter of legal compulsion. For example, in a February 1944 statement on British policy towards occupied countries, Foreign Secretary Eden explained an earlier statement of the Prime Minister in which he said that he and Stalin had agreed on the need for Poland to obtain compensation at Germany’s expense.⁴³⁹ When he was asked whether that meant an abandonment of the Atlantic Charter’s principles, he stated that the government did not

wish to try to claim some strained or unilateral interpretation for the Atlantic Charter. All . . . the Prime Minister intended to convey was that Germany would not, as a matter of right, be able to claim to benefit from the Atlantic Charter in such a way as to preclude the victorious Powers from making territorial adjustments at her expense . . .⁴⁴⁰

Similarly, on several occasions Churchill was at pains to remind his listeners that the existing obligations language in the Fourth Point had been inserted by him and that he agreed to Article VII of the Lend Lease Agreement only

436. *Id.* at 295-96.

437. See generally N.Y. TIMES, Jan. 1, 1942. For similar, post-1945, assertions see HAROLD HANSEN ET AL, FIGHTING FOR FREEDOM—HISTORIC DOCUMENTS 32 (1947); ALAN NEVINS, THE NEW DEAL AND WORLD AFFAIRS—A CHRONICLE OF INTERNATIONAL AFFAIRS 1933-1945, 252 (1950) (during the war, it was regarded as a “binding national commitment”).

438. Herbert Evatt, *Address on War Aims and Reconstruction Before the House of Representatives*, in HOLBORN, *supra* note 214, at 333.

439. 397 PARL. DEP.-COMMONS 932-41, in HOLBORN, *supra* note 214, at 468.

440. *Id.* at 469.

after being assured that it excluded Imperial Preference.⁴⁴¹

Churchill treated the Atlantic Charter as an absolutely binding obligation in classified communications with close colleagues. Thus, in referring to Britain's non-recognition of the Russian control of the Baltic States and some other territory, he noted in an early 1942 telegram to Eden:

I regard our sincerity to be involved in the maintenance of the principles of the Atlantic Charter, to which Stalin has subscribed

. . .

You have promised that we will examine those claims of Russia in common with the United States and the Dominions. That promise we must keep. But there must be no mistake about the opinion of [the] British Government . . . that it adheres to those principles of freedom and democracy set forth in the Atlantic Charter . . .⁴⁴²

These state actions and statements, plus the repeated formal references to and reiterations of the Atlantic Charter in treaties, conference resolutions, declarations of national policy and joint communiques, meticulously compiled in government files, might be cited both as evidence of the state practice and *opinio juris* of the United States and some of its allies. Also, these might be confirmed by the opinions expressed in the media. The conclusion is greatly strengthened if the Atlantic Charter is a treaty or otherwise has conventional law status.⁴⁴³

441. 399 PARL. DEB.—COMMONS 577-87 (Apr. 21, 1944). Similarly, Louis refers to Amery's rebuttal of the argument that the establishment of a Jewish homeland in Tripolitania would be a violation of the Charter's territorial aggrandizement Point (the First) by arguing that there could be no such aggrandizement if the inhabitants wanted to live under the Union Jack: LOUIS, *supra* note 251, at 62-63. See generally N.Y. TIMES, June 3, 1942, reporting Viscount Cranborne's comment that the U.K. Government considered itself pledged to carry out all of the Atlantic Charter's articles—but only jointly with the other United Nations and only after the peace had come. Also note Evatt's usually careful statements: "if the general principles of the Atlantic Charter are carried out . . . it may be necessary for . . . governments to accept obligations of an international character affecting matters which, in the past, have . . . been regarded as matters of domestic concern only (Address, *Post war Problems of the Pacific*, Apr. 28, 1943, III U.N. REV. 180 (May 13, 1943)). "I regard every word of the Atlantic Charter as of importance. Australia should fight hard to see that its principles are carried into practical effect . . . True [it] is not a treaty. It is something greater. It is a noble expression of objectives." (Address before U.S. House of Representatives, Oct. 14, 1943, HOLBORN, *supra* note 214, at 640).

442. Churchill to Eden, Jan. 8, 1942. in 3 WINSTON CHURCHILL, THE SECOND WORLD WAR—THE GRAND ALLIANCE 696 (1950).

443. See e.g., Hooper, *supra* note 307; Leo Pavolsky, *Memorandum on Official Statements of Post-War Policy*, Jan. 3, 1942, *microformed on* CIS No. 580-20. Many were also reissued in such privately published compendia as HOLBORN, *supra* note 214, and the books and pamphlets put out by the numerous organizations engaged in discussing post-war issues. For a discussion of the stimulation or inducement of customary international law by treaties see ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103-66, 272-74 (1971).

C. *The Atlantic Charter As Conventional International Law*

1. The status of inter-state declarations

On its face, the Atlantic Charter did not purport to be a treaty but was a declaration of the common principles on which the subscribing states based their hopes for a better future of the world. According to Oppenheim, a distinguished contemporary writer, the term was generally used in three different senses: (1) the title of a body of stipulations in a treaty, (2) an unilateral declaration which created rights and duties for other states, *e.g.*, as exemplified by declarations of war and neutrality, and (3) an explanation of a line of conduct pursued by a state in the past or of views or intentions on certain other matters.⁴⁴⁴ These did not create rights and duties for non-parties, but Oppenheim conceded that it was

not certain to what extent [this last class] create[d] rights and obligations between parties. The answer depend[ed] to a large extent on the precision of the language used . . . [For instance], official statements in the form of Reports of Conferences signed by Heads of State or Governments and embodying agreements reached therein may in proportion as these agreements incorporated definite rules of conduct, be regarded as legally binding upon the States in question.⁴⁴⁵

Oppenheim regarded the Atlantic Charter as belonging to the third class, but did not include an example of those Declarations which conferred legal rights and duties between parties.⁴⁴⁶

Hackworth, another distinguished contemporary authority and the legal adviser in the Department of State, noted in his 1943 *Digest of International Law*, that in 1923, U.S. Secretary Hughes had held, in connection with a U.S.-Turkish extradition treaty and a general treaty, that Turkish declarations regarding the administration of justice and sanitary affairs in Turkey "may doubtless be regarded as constituting international commitments."⁴⁴⁷ He also referred to the *Minority Schools in Albania* case, in which the Permanent Court of International Justice appeared to have regarded a declaration by

444. OPPENHEIM, *supra* note 36, at 787-88.

445. *Id.*

446. *Id.* at 787-88. The example he cites is the Declaration after the 1945 Crimea Conference which, of course, reaffirmed the Atlantic Charter. Oppenheim's formulation is echoed in Fleischauer's recent article on declarations: "Much depends upon the attention given to the principles set forth in the declaration by individual states . . ." Fleischauer, *Declaration*, 7 ENCYCLOPEDIA OF PUB. INT'L L. 67, 68 (1984).

447. GREEN H. HACKWORTH, V INT'L LAW. 35-36 (1943).

Albania to the League of Nations as creating an international obligation.⁴⁴⁸

In 1942, in an interesting colloquy in the House of Commons, the British Foreign Minister seemed to take the position that, as a declaration, the Atlantic Charter could be binding without being ratified.⁴⁴⁹ And Secretary Hull, an experienced lawyer, in instructions issued in 1943 to the U.S. Embassy in Colombia, noted that the U.S. government considered the United Nations Declaration as a declaration, and not a treaty, in consequence of which it had not been submitted to the Senate. Later on, in his memoirs, he pointed out that the 1943 Moscow Declaration had originally been couched as a treaty but was changed into a declaration since it would come into effect at once, and would have the immediate result of convincing other nations that the governments of the four major powers were in agreement.⁴⁵⁰

In a brief 1944 analysis, Jones, a noted British scholar, took the position that a declaration like the Atlantic Charter "may . . . by being communicated to other powers create a legal agreement."⁴⁵¹ Finally, Asamoah cited judicial decisions for the proposition that a declaration may constitute an agreement, at least within the context of interactions between members of an international organization.⁴⁵² It is possible that such a thesis might apply to the states associated in the massive wartime alliance.⁴⁵³

A more equivocal assessment of the Atlantic Charter was made by a leading British jurist less than three weeks after August 14, 1941, The Declaration is in no sense a treaty. It is a declaration of certain common

448. *Id.* For the Minority Schools case see Permanent Ct. Int'l. Jus., *Minority Schools in Albania Advisory Opinion*, P.C.I.J. (ser. A/B) No. 64 (1935). A more recent case in which the vitality of an unilateral declaration was affirmed by the World Court is the consolidated *Nuclear Test Cases (Australia v. France)*; *New Zealand v. France*, I.C.J. Rep. (1973).

449. Having been asked to state the cases where ratification was needed for the Charter to become binding on adherents, Foreign Minister Eden noted that the question of ratification did not arise. Then the following exchange occurred:

Mr. Douglas: asked the Secretary of State how many nations have adhered to the Atlantic Charter; and in which cases ratification is necessary in order that the adhesion may be binding?

Mr. Eden: . . . The [Atlantic] Charter is a declaration of principle which is open to any Government to express adherence. The question of ratification does not arise.

Mr. Douglas: Are we to understand that [the Atlantic Charter] is not binding upon any Government that adheres to it?

Mr. Eden: I did not say that. Pronouncements can be binding without being ratified.

287 PARL. DEB.—COMMONS 140 (February 24, 1942).

450. Hull to Lane (U.S. Ambassador to Colombia), Dec. 15, 1943; HULL, *supra* note 212, at 1546.

451. Jones, *International Agreements other than "Interstate Treaties"—Modern Developments*, 21 BRIT. Y.B. INT'L L. 111, 121 (1944).

452. ASAMOAH, *supra* note 123 (citing *Railway Traffic Between and Poland*, P.C.I.J., (ser. A/B) No. 42, at 116); *Corfu Channel Case*, 1946-48, I.C.J. Rep. 26; *International Status of South-West Africa case*, 1950, I.C.J. Rep. 128; ARNOLD MCNAIR, *THE LAW OF TREATIES* 7-15 (1961). He also notes, *inter alia*, the *Legal Status of Eastern Greenland*, 1933 P.C.I.J., (ser. A/B.) No. 53 (oral declaration by Norwegian Foreign Minister bound his government).

453. See *supra* notes 219-23.

principles on the national policies of the two countries.⁴⁵⁴ On the other hand, he also said that:

It is clear that a joint statement by President of the U.S.A and the Prime Minister of Great Britain is a event of high importance, and that it requires a special solemnity from the dramatic circumstances of its issue, from its joint character, and because, by clear implication, it invites other countries to rely on observance by the parties making it.⁴⁵⁵

Another well-known scholar's view was that "even a joint Declaration, like the January 1942 Declaration, had no legal power . . ."⁴⁵⁶ Likewise, Anthony Leriche, noted that the charter's norms were formal statements of principle which would continue to be subscribed to only as long as they serviced as a prelude to the creation and effective operation of mechanisms likely to maintain peace. However, he thought that it was possible to view the Charter as an alliance, but that analysis was inadequate, it being preferable to view it as the foundation of a vast ecumenical organization and a declaration of rights which was a prelude to a constitution for a larger social order, as well as a declaration of rights with legal principles not rising higher than the level of "general principles of law" as stated in the Charter of Permanent Court of International Justice.⁴⁵⁷ It is submitted that the inter-party binding status of the Atlantic Charter, qua Declaration, is a conclusion which is hard to resist.

2. Treaty format or intent

Brierly's view that the Atlantic Charter was in no sense a treaty, was noted earlier. A similar view what that of Evatt, Australian Attorney General and Foreign Minister, who denied that the Atlantic Charter and the Four Freedoms were "legal instruments technically binding on Austra-

454. James Brierley, *Note on the Atlantic Declaration*, Sep. 3, 1941, U.K. PUB. REC. OFFICE, CAB 117/58, 5993.

455. *Id.* Note also T. Elorrieta y Artaza's view that the Atlantic Charter was more comparable to a constitutional instrument than to a treaty. Its dispositions should be observed, depending on the circumstances of the [changing] times. But it did not have immediate binding and sanctionable effect, being more in the sphere of political morality. THOMAS ELORRIETA Y ARTAZA, *LA CARTA DEL ATLANTICO Y LA CARTA DE FILADELFIA—REFLEXIONES Y DOCUMENTOS* 23 (1945).

456. C.J. HAMBRO, *HOW TO WIN THE PEACE* 299 (1942). Compare Schwarzenberger's dismissal of the juridical significance of "declarations of policy such as the Atlantic Charter . . ." by virtue of absence of intention to create legal relations. SCHWARZENBERGER, *supra* note 56, at 140.

457. A. Leriche, *Quelque Reflexions Sur la Charte de l' Atlantique*, 48 R.G.D.I.P. 101-111 (1941-1945). For the World Court Charter's provision, see art. 38 of the I.C.J. statute, *supra* note 2.

lia."⁴⁵⁸ Since the forms of international agreements are so varied, format is not necessarily conclusive. Neither, in this case, is intent, since the available records do not reveal much on this point. At any rate, intent is often both elusive and inconclusive. Admittedly, only one recent writer, Reynolds, openly expresses the belief that both Roosevelt and Churchill intended the Third Point to cover the British Empire, but that is not inconsistent with the parties' possible intent that the Charter should be a binding agreement.⁴⁵⁹

However, one interesting side-note is provided by Jones, who noted that Attlee, the Deputy British Prime Minister, went far, since he "appeared to assent—though ambiguously—to the view that the document had the status of a treaty:"

Sir. H. Williams: Is it not a fact that this agreement is not a treaty at all?

Mr. Stephen: Does the right hon. Gentleman not realize that what he is saying now means that the Atlantic Charter is without meaning?

Mr. Attle: The hon. Member is entirely wrong. The Atlantic Charter lays down certain principles. The following out of those principles has to be worked out between the Powers concerned.⁴⁶⁰

Nevertheless the Atlantic Charter is probably not a treaty as the term was generally understood in 1944.

3. Formalities

Even if it is not a treaty, the possibility exists that it is a more generic form of agreement. For this reason, the issue of formalities will now be considered, with some relevance to the previous discussion about the Atlantic Charter as a declaration.

The Atlantic Charter was unsigned, the only actually signed copy in public ownership being a press release on which Roosevelt signed both his and Churchill's names.⁴⁶¹ During a press conference on December 19, 1944, apparently seeking to downplay somewhat the highly idealistic Charter in the light of the fact that the tide of the war had turned, Roosevelt jocularly denied the Atlantic Charter was a formal document, remarking that it was

458. Evatt, *supra* note 438, at 324.

459. REYNOLDS, *supra* note 208, at 259.

460. Jones, *supra* note 451, at 370 PARL. DEB.-COMMONS 210 (Mar. 3, 1942).

461. SAMUEL ROSENMAN, 13 [F.D.R. PUBLIC PAPERS] VICTORY AND THE THREAT OF PEACE 439-40 (1950). Mr. George Elsey privately owns a copy signed by both leaders, whose signatures he procured during an official tour of duty at the White House. See Laing, *supra* note 207 (citing GEORGE M. ELSEY, ORAL HISTORY 82-90 (1970)).

unsigned.⁴⁶²

Roosevelt's remarks provoked intense criticism. For instance, Congressman Bartel J. Jonkman noted that in addition to sending to the U.S. Congress a document in which the names of the two redactors were signed, in his statement on the Charter's second anniversary, Roosevelt had referred to the signing of the Charter.⁴⁶³ Furthermore, he noted that the Declaration by United Nations recited that the two leaders had subscribed to the Atlantic Charter and that the assertions by leading periodicals that the document had been signed, had never been refuted by either of them.⁴⁶⁴

In fact, there appears to have been no authoritative statement that the international law prevailing in 1941, required that signatures necessary for the validity of an agreement. The only significant authority was a dictum in the *Legal Status of Eastern Greenland* case that a state can be bound by a purely unwritten statement.⁴⁶⁵ Therefore, U.S. under Secretary of State Welles, was on good ground when he asserted that the Charter "was precisely as valid, in its binding effect, as if it had been signed."⁴⁶⁶ Churchill reveals his clear understanding of the Charter's real status in his

462.

THE PRESIDENT: It isn't a formal document. He [Churchill] has got a lot of his handwriting—some of mine—in it, and I don't know where it is now.

Q: I understand that, sir, but the caption on that statement we received said it was a statement signed by yourself and the British Prime Minister. I was just trying to clarify whether the document had signatures on the bottom of it or whether it did not?

THE PRESIDENT: Oh, I think it's probable, in time, they will find some documents and signatures.

Q: The spirit still is there, sir?

THE PRESIDENT: Well, we all agreed on it, that's all I know. I have some memoranda that were signed by the British Prime Minister, but it wasn't the complete document. It isn't considered signed by us both.

Q: My recollection is that the thing that came up to the Capitol said at the bottom "signed by Roosevelt and Churchill."

THE PRESIDENT: It was signed in substance. There is not formal document—complete document—signed by us both. There are memoranda to the people then and to the radio people. . . .

Q: Have you, since that time, Mr. President, wished that you had a formal document which was signed, sealed and attested?

THE PRESIDENT: No, except from the point of view of sightseers in Washington. I think that they will like to see it, perhaps not so much as the Declaration of Independence or the Constitution of the United States. Well, if you wanted to exhibit it, there won't be any good reason we can't.

ROSENMAN, *supra* note 461, at 439-40.

463. 9 CONG. REC. A128-31, 79th Cong, 1st Sess. (Jan. 15, 1945).

464. *Id.*

465. *Legal Status of Eastern Greenland*, Judgment, P.C.I.J. (ser. A/B) No. 53 (1933). *See also* HACKWORTH, *supra* note 447, at 31-33, quoting McNair and several other authorities, including the *Eastern Greenland* case, to the effect that oral and other non-written indications of consensus were binding. *Cf.* Schwarzenberger, that from a purely international perspective, the Atlantic Charter is not only a treaty, but "was not even signed by either Roosevelt or Churchill." GEORG SCHWARZENBERGER, *POWER POLITICS—SOCIETY* 289-90 (3d ed. 1964).

466. Welles, *supra* note 254, at 16.

report on what Roosevelt said to Stalin during the Yalta Conference about Churchill's views on the British constitution, and Churchill's own remarks, expressed to Roosevelt and Stalin:

I was always talking about what the [British] Constitution allowed and what it did not allow, but actually there was no Constitution. However, an unwritten Constitution was better than a written one. It was like the Atlantic Charter; the document did not really exist, yet all the world knew about it. Among his papers he had found one copy signed by himself and me, but strange to say both signatures were in his own handwriting. I replied that the Atlantic Charter was not a law, but a star.⁴⁶⁷

It was sometimes noted that the Atlantic Charter contained no enforcement language or machinery. Former Secretary of State Hull had a stock answer for such comments, since they were made about other, even more general, and unilateral, statements his Department had issued, such as his "Eight Pillars of Peace" in 1936:

Unfortunately, if a nation violated some of the commonly accepted rules of international conduct, there was no police to ensure punishment. All the more reason, therefore, for some of us never to relax our efforts to convince the people of the world . . . that international morality was as essential as individual morality.⁴⁶⁸

Of course, part of the alleged problem with the Atlantic Charter is the generality and vagueness of its provisions, which are phrased as principles. They are far from being as undirected as many of Hull's Principles, which betrayed insensitivity to the harsh environment of international relations.⁴⁶⁹ Even so, with the attitude towards principles recounted earlier,⁴⁷⁰ the penchant of common law jurists and statesmen for inductivism, realism, and their "rooted distrust of 'generalities,'"⁴⁷¹ and preference for empirical case-by-case solutions, principles sometimes tended to be regarded as excessively subject to a "great variety of interpretation."⁴⁷² Yet, as was pointed out to Hailey, there are nations in the world, including the United

467. WINSTON CHURCHILL, 6 *THE SECOND WORLD WAR—TRIUMPH AND TRAGEDY* 392-93 (1953).

468. HULL, *supra* note 212, at 537.

469. *See generally id.* Hull was very defensive of his principles, which were solid, living, all-essential rules.

470. *See supra* note 404.

471. Hocking, *Problems IX, Colonies and Dependent Areas, Analysis*, in *UNIVERSITY COMMITTEE ON POST-WAR INTERNATIONAL PROBLEMS, FINAL REPORT 1* (1945).

472. Lord Hailey, *The Colonies and the Atlantic Charter*, 30 *ROYAL COMM. SOC. J.* 235 (1943)

States, which attach a great deal of importance to formal statements of public principle.⁴⁷³ Therefore, as Betson commented, "in the very interests of decent international collaboration, we must not ignore this desire for formal solemn declarations by which nations feel they should be bound."⁴⁷⁴ An "appeal to principle offers a stable ground for improvement in the international field"⁴⁷⁵ as long as it is recognized that often, more than one principle is pertinent to an issue and that "the role of any principle is . . . to establish a presumption not to dictate a final conclusion about what ought to be or be done."⁴⁷⁶

Nevertheless, although Stone felt that Evatt's and Brierly's views about the Charter seemed too definite, he thought that it was "well to point to the grounds for doubting the international legal binding force of the Charter"⁴⁷⁷ because it was doubtful whether such words as desire, wish, hope, and believe could import legal obligations; such terms were "some evidence that the parties did not intend to create legal, as opposed to moral obligations."⁴⁷⁸ Similarly, Corwin noted that while the Atlantic Charter bore

some of the marks of a bilateral agreement between the two governments, the document is stamped by the vague generality of its terms rather as a proclamation to the world at large of the benevolent intentions of its eminent authors than as a state act intended to give rise to obligations in the technical sense.⁴⁷⁹

473. *Id.*

474. Betson, Comment on Hailey's remarks, *id.* at 244.

475. Hailey, *supra* note 472, at 235.

476. In September 1943, Attlee, the U.K. Lord Privy Seal, noted that criticisms of the Charter were "rather too narrow and legalistic . . . in a general statement made by the heads of two great States you cannot expect to get more than general principles. The application has to be worked out later on . . ." 374 PARL. DEB.-COMMONS 149-50 (Sept. 9, 1941).

477. STONE, *supra* note 414, at 147.

478. *Id.*

479. EDWARD CORWIN, THE CONSTITUTION AND WORLD ORGANIZATION 40 (1944). Brierly also noted that "the Declaration contains no definite promise . . . The nearest approaches to a commitment are the phrases 'will endeavour to further' in Article 4 . . . and 'will aid and encourage' in Article 8 . . ." Brierly, *supra* note 454. On another linguistic issue, Barron noted that the title "Charter" was significant, since it was more permanent than an "aim". According to a 1942 State Department analysis, "Charter" is an old, impressive word inherently implying that the authority granted by it is handed down. In 1944, another Departmental analysis noted that the term had been employed to lay down broad principles and establish the powers by which constitutional action is made possible. From the time of the Magna Carta in England to the Atlantic Charter, it has been synonymous with liberty under law. Meyers memo, *Analysis of the Factors Included in International Political Organization*, July 25, 1942, microformed on CIS No. 1070-3; McKimmid, *The Nature of the Basic Instrument Establishing the International Organization*, June 16, 1944, microformed on CIS No. 860, P.I.O. 287.

Some of those who waxed warm over the Charter also affixed such labels as the New York County Lawyers' "rule of law to govern all nations," Ryan, *World Court Applying Atlantic Charter as Supreme Law*, in NEW YORK COUNTY LAWYERS ASSOCIATION, WORLD COURT APPLYING ATLANTIC CHARTER AS SUPREME LAW 15 (1945) and Sanwell's noting that it bestowed rights on all individuals. B.K. Sanwell, *The Atlantic Charter*, 48 QUEENS Q. 295 (Aug. 1941). These, however, do not advance the present analytical inquiry.

However, there has never been any prohibition of use of the language of principle ion binding legal instruments. Furthermore, when one has regard to the seriousness with which the Atlantic Charter was universally regarded after 1941, these concerns seem to be dispelled, and the binding effect of the Charter, as a declaration, or, perhaps, an unspecified species of generic agreement is possibly confirmed.

4. Compliance with domestic constitutions

According to the U.S. Constitution, in 1941 and today, the ratification of instruments called treaties required the prior advice and consent of the Senate. While there was no written constitutional or legal requirement about such matters, in Great Britain the practice was that each treaty subject to ratification was required to be given to Parliament within 21 days after signature. Breach of this American rule and British practice would not, per se, internationally nullify or impair any treaty. But breach of such requirement of written constitutional law entitled the party whose law was not followed, to consider the treaty voidable. However, it was clear that no one considered the Atlantic Charter to be a treaty, as a matter of either international or municipal law.⁴⁸⁰

According to American law, the United States can be committed by less formal executive agreements, which do not require Senatorial participation. There are a vast number of such agreements, which were no less binding than treaties, concluded by the Executive Branch: (1) Pursuant to prior authorization by Congress, *i.e.* under delegated authority; (2) by virtue of Congressional approval, *e.g.*, given in a post facto decision to appropriate funds; and (3) by virtue of the Executive's constitutional power to be the organ of communication with foreign governments and to execute laws, including Acts of Congress, treaties, and rights, duties and obligations growing out of the Constitution itself, the country's international relations, and all the protection implied by the nature of the government under the Constitution.⁴⁸¹ In this connection, Erwin Corwin, a preeminent authority on constitutional law, noted that,

On August 14, [1941] F.D.R. and Churchill announced that they had met at sea and "discussed lend-lease and other problems of common defense" and agreed upon a postwar "peace program," termed the Atlantic Charter. Thus, without consulting either the

480. ARNOLD MCNAIR, *THE LAW OF TREATIES* 64-69 (1961), HAMBRO, *supra* note 456, at 260-61. During a debate in the House of Commons in the House of Commons Attlee admitted that the "Atlantic Charter remains the basis of His Majesty's Government's policy," but he could give no assurance that there would be no departure from its principles without prior Parliamentary assent, since giving such prior assurance would "depart from the established practice." 380 PARL. DEB.-COMMONS 806 (1942), reprinted in *THE LONDON TIMES*, June 5, 1942. Cf. K.T. SHAH, *FOUNDATIONS FOR PEACE* 43-44 (1945).

481. ERWIN CORWIN, *THE PRESIDENT'S OFFICE AND POWERS* 1787-1948, 235-74 (1948).

Senate or Congress, the President virtually committed the United States of America to a postwar alliance with Great Britain.⁴⁸²

It seems that it is possible to infer from Corwin's statement an argument supporting a contention that the Atlantic Charter satisfied the domestic law prerequisites for an executive agreement. However, while not necessarily quite saying or implying, Corwin went even further in noting another source of executive power, *i.e.* the President's simple day-to-day conduct of foreign relations "[well] illustrated by the expedients which were employed in carrying out prior to Pearl Harbor the policy of furnishing aid to [the allies] . . . 'short of war'."⁴⁸³

Nevertheless, the most that can be said in this connection is that the possible international legal validity of the Charter has not been impaired by anything in the domestic constitutional orders of the first two declarant countries.⁴⁸⁴

5. Post-promulgation technicalities and practice

Quite apart from the evidence of substantive state practice which we considered earlier, in connection with the Charter's possible customary law status, it will now be considered whether technical actions and practice following promulgation, affect the possible status of the Charter as a binding declaration or international agreement. Fenwick queried whether the acquisition under the post-war Peace Treaties of territory by the Soviet Union, Poland, Yugoslavia and France was violative of the First Point, and noted that "[t]he incorporation of the Charter in the Declaration by United Nations . . . gave to the principle an international character."⁴⁸⁵

482. *Id.* at 247.

483. *Id.* at 474. Note U.S. Colonel V. Miller's comment, during a British Grotius Society conference, that

the general approval of the American people and the frequent Congressional recognition and ratification of the Presidential acts . . . have determined an interpretation of the general terms of the Constitution which assures that the Government shall not be powerless in a time of national crisis. This is . . . important in view of the Atlantic Charter . . . 'Self-preservation is the first law of international life, and the Constitution itself provides the necessary powers in order to defend and preserve the United States. . . ' [quoting former Chief Justice Hughes]

Colonel Vincent Miller, 30 *TRANSNAT'L GROTIUS SOC.* 24, 30 (1945). Note, also, the excerpt from an editorial in *Barrons* in October 1941, which, in reference to the Atlantic Charter, noted that in foreign policy the President has enormous, if somewhat undefined, powers to lead the Nation to a point from which it could not turn back; and the course of events was often more influential than any of the three departments of government.

484. See also *Sipes v. McGee*, 334 U.S. 1 (1948)—non-application of the Atlantic Charter as treaty in effort to nullify racially restrictive property covenant under United States and Michigan State law.

485. FENWICK, *supra* note 140, at 361. The Atlantic Charter and Declaration by U.N. are among the textbook's six appendices.

As far as concerns listings of treaties, in the November 1943 issue of the Department of State Bulletin is contained a list of treaties, in which Egypt is stated to have adhered to the Atlantic Charter.⁴⁸⁶ Then, since 1948, in successive Departmental publications giving the status of treaties to which the United States is a party, there was an entry of the Atlantic Charter, with the names of states which subscribed to the Declaration By United Nations. On the other hand, in Kavass and Sprudz's current list of treaties, both the Atlantic Charter and Declaration are separately listed, although with the same source references.⁴⁸⁷ While there is no definitive statement of the juridical effect of such statements, it is possible that in a properly-documented situation, state department listing might comprise evidence of a consistent American view that is bound by the Atlantic Charter as treaty, declaration or statement of customary law *opinio juris*. Certainly, it is a highly significant factor, when cumulated with the numerous other factors pointing to the Charter's deep normativity.

VIII. CONCLUSION

A. *The Atlantic Charter In Customary International Law*

The evidence seems very compelling that the Charter itself, and the various actions of the United States during 1941-1945 relating to self-determination under the Atlantic Charter, constitute substantial instances of state practice consistent with the existence of a binding norm of customary international law. That norm emerged some time after August 1941, it is believed well before the Dumbarton Oaks conversations in 1944. The United States' state practice was echoed by practice by at least two colonial powers, the United Kingdom and the Netherlands, and possibly France; by the other Allies which subscribed to the Charter in September 1941 and by the parties to Declaration By United Nations. The actions of the various non-state claimants at least constitute some of the cataclysmic forces which helped to motivate the aforementioned state practice. If, however, international law at the time,⁴⁸⁸ especially in view of the global wartime exigency, embraced a broad conception of international legal actors, then those actors might also have engaged in state or other relevant practice. These various actions by those states and non-state actors could arguable constitute either the requisite

486. DEP'T ST. BULL., 1943, at 469.

487. U.S. DEP'T ST., U.S. TREATY DEVELOPMENTS (1948). The heading is "Atlantic Charter," under which is listed, firstly, the 1941 Declaration, followed in the next line, by the 1942 Declaration. Only in Appendix III (B) is the Declaration By United Nations listed by itself, with a paraphrase of its purposes, including that parties thereto thereby subscribe to the purposes and principles of the Atlantic Charter. See also TREATIES IN FORCE FOR THE UNITED STATES, 283 (1990), where there is listed the Atlantic Charter, with the two original parties and 45 adherents. KAVASS & SPRUDZS, *supra* note 220, at 8.

488. *E.g.*, by virtue of some concept of international law in a transitional or sovereignty-hiatus situation. See *supra* notes 161-68.

material element and/or the psychological element, the *opinio juris*, for the emergence of a customary norm of self-determination. The evidence also suggests that other principles in the Atlantic Charter have a similar jural status.

Actually, this archival state practice of juridical facts and *opinio juris* is confirmed, by certain post-1945 actions and statements which appear to have been previously inadequately assessed. These include President Truman's affirmation on October 27, 1945 that:

We believe that all peoples who are prepared for self-government should be permitted to chose their own form of government by their own freely expressed choice, without interference from any source. That is true in Europe, in Asia, in Africa, as well as in the Western Hemisphere.⁴⁸⁹

Another action is the Pacific Charter of September, 1954, by which Australia, France, New Zealand, Pakistan, the Philippines, Thailand, Great Britain and the United States proclaim that

First, in accordance with the provisions of the United Nations Charter, they uphold the principles of equal rights and self-determination of peoples and will earnestly strive by every peaceful means to promote self-government and to secure the independence of all countries whose peoples desire and are able to undertake its responsibilities; and,
Second, they are each prepared to continue taking effective practical measures to ensure conditions favorable to the orderly achievement of the foregoing purposes in accordance with their constitutional procedures . . .⁴⁹⁰

The Pacific Charter, long anticipated in the early 1940s as a desired outgrowth of the Atlantic Charter, was accompanied on the same date by the South East Asia Treaty, between the same states, which contains a preamble with language identical to that of the first provision of the Pacific Charter.⁴⁹¹ Both instruments are currently listed as being in force as international agreements.⁴⁹²

The Pacific Charter was not a rhetorical exercise. As U.S. Secretary of State Dulles remarked in September 1954, it was issued in relation to the concern that "one of the most effective weapons of communism was to pretend that the Western Powers were seeking to impose colonialism on the

489. Bunche, *supra* note 142, at 1044.

490. 209 U.N.T.S. 23; 6 U.S.T. 91, T.I.A.S. 3171; DEP'T ST. BULL., 1959, at 393.

491. *Id.*

492. U.S. Dep't St., TREATIES IN FORCE FOR THE UNITED STATES 306 (1989).

Asian peoples.”⁴⁹³ The Charter had therefore “in ringing terms, dedicate[d] all the signatories to uphold the principles of self-determination, self-government, and independence for all countries . . .”⁴⁹⁴ Similarly, Deputy Assistant Secretary Everitt Drumwright, in an address earlier that month, noted that the Pacific Charter was “a guarantee to the Asians of our intentions and those of the French and British allies.”⁴⁹⁵ And to nail home the content and universal significance of this new Charter, Walworth Barbour, Assistant Secretary of State, in an October address, had recalled that the “central theme of freedom in the American approach to the world”⁴⁹⁶ was reiterated in the Four Freedom speech. More recently, it had made itself felt in the Atlantic Charter, the U.N. Charter and the Pacific Charter, the “great importance” of the last of which was “its application to all areas including underdeveloped or colonial areas. It expressed clearly the American desire to see the principle of self-determination extended throughout the world wherever a people desires . . .”⁴⁹⁷

Another public act of some significance was the Joint Declaration, of February 1, 1956, by President Dwight Eisenhower and British Prime Minister Eden, whereby they upheld the basic right of peoples to government of their own choice,⁴⁹⁸ and then stated:

These beliefs of course are far more than theory or doctrine. They have been translated into the actual conduct of our policy both domestic and foreign. We are *parties* to the Atlantic Charter, the Potomac Charter and the Pacific Charter. In them we have, with other friends, dedicated ourselves the goal of self-government and independence of all countries whose peoples desire and are capable of sustaining an independent existence. During that past ten or more years 600 million have, with our support and assistance, attained nationhood. Many millions more are being helped surely and steadily toward self-government. Thus, the reality and effectiveness of what we have done is proof of our sincerity.⁴⁹⁹

493. John Dulles, Broadcast address, Sept. 27, 1954, DEP'T ST. BULL., 432.

494. *Id.*

495. Drumwright, Address, DEP'T ST. BULL. Oct. 18, 1954, at 579.

496. Barbour, Address, DEP'T ST. BULL., Oct. 3, 1954, at 576-77.

497. *Id.*

498. Joint Declaration of February 1, 1956, DEP'T ST. BULL., 1956, at 231; MARJORIE S. WHITEMAN, DIG. OF INT'L L. 46 (1965).

499. WHITEMAN, *supra* note 498, at 46 (emphasis added). One interesting tidbit is a draft resolution submitted by Eisenhower to the House and Senate on February 20, 1953, rejecting “interpretations or applications of any international agreements made during.” World War II, which have been perverted to bring about the subjection of free peoples “and join in proclaiming the hope that the peoples who have been subjected to the captivity of Soviet despotism shall again enjoy the right of self-determination . . . [and] that they shall again have the right to choose the form of government under which they will live, and that sovereign rights of self-government shall be restored to them all in accordance with the pledge of the Atlantic Charter.” *Id.* at 47.

In the 1950s the threat of communism was considered to be very real and ever-present. By no means, therefore, could these appeals to the Atlantic Charter principle of self-determination have been rhetorical exercises. There is no doubt, then, that they constituted reiterations of the material elements and *opinio juris* of an existing binding norm. Hence we recall, with Ofuately-Kudjoe, that the search by jurists for a rule *de lege ferenda* is often one which characteristically disregards "massive evidence that the principle [has already] ripened into a rule of international law."⁵⁰⁰ Hence, the doctrinal activity described in part III of this article is relevant to the possible elaboration of a *corpus juris* for self-determination, but the principle was already well established.

B. The Atlantic Charter As Conventional Law

Whether or not the Atlantic Charter has a valid status in customary law, it is hard to deny that it constitutes conventional law between the parties to the Declaration By United Nations. That conventional law serves to establish that a binding norm on self-determination was established prior to the date of signature of the U.N. Charter. That norm entered the U.N. Charter and the general corpus of U.N. law, thus helping to establish the normative status of the self-determination principle immanent in U.N. Charter Articles 1(2) and 55 and Chapters XI and XII. The intricate and controverted doctrinal fabrics concerning U.N. Charter interpretation and purported U.N. law-making, therefore, lose some of their pertinency.

C. The Value Base of the Principle of Self-Determination

The norms in the Atlantic Charter's Second and Third Points are obviously written as broad principles, a fact which does not impair their validity. More significant is their value basis, which, like the rest of the Atlantic Charter, is a broad group of basic human rights and fundamental freedoms which has been labeled Humanitarian Universalism.⁵⁰¹ Their appearance of opaqueness is consistent with their constitutional or value-level formulation. To infer and understand their scope and content, one should consider the human problems faced by the redactors at a time of the most extreme urgency and crisis.

Furthermore, as earlier noted the cataclysmic nature of the war and the unprecedented nature of the attendant circumstances, might well strengthen that branch of self-determination law, the application of which, it has been

500. OFUATEY-KUDJOE, *supra* note 25, at 149-50. See also WILSON, *supra* note 112, at 79 (to the effect that more important than the thoughts of those who analyze the law are the actions of states which make the law). Compare the doctrinal survey generally in part II and at *supra* notes 36-46 in particular.

501. See generally Laing, *supra* note 207.

said, is invoked in radical transitional or sovereignty-hiatus situations.⁵⁰² Thus, it might be plausibly argued that the broad norm of self-determination of colonial and conquered peoples, as proclaimed in the Atlantic Charter, is properly based on a value base of (1) the forcible deprivation of their sovereign rights and self-government *e.g.*, by the colonizing and conquering nations (Second and Third Points) or (2) the denial of the right of free exercise of the franchise (Third Point). In the context of the Atlantic Charter's Humanitarian Universalism, this therefore places the norm of self-determination on a firm foundation of human rights deprivation, which becomes a cogent basis for assessing claims to self-determination, including those relating to the transitional or sovereignty-hiatus paradigm.

D. *The Scope Of The Principle Of Self-Determination*

It is therefore evident, that the colonial territories and the other territories forcibly deprived of sovereign rights are the minimum beneficiaries of the norm of self-determination. This furnishes an argument favoring the legitimacy of the independence of the Baltics between 1939 and 1992.⁵⁰³

More interestingly, the human rights value basis provides a strong foundation for the analysis of future claims to self-determination. This especially applies in the context of secession, currently a very pressing doctrinal and practical problem. It is submitted that the main task should now be to identify the minimum content of the corpus of human rights entitlement considered to be in *pari materiae* with the Atlantic Charter's self-determination norm. That corpus might be a somewhat opaque amalgam of the Four Freedoms/Atlantic Charter provisions, the United States 1942 Draft Bill and the 1943 Draft Declaration of Human Rights, the 1948 Universal Declaration of Human Rights and the two international human rights Covenants,⁵⁰⁴ or, if a teleological approach is used, subsequent human rights instruments. The basis on which secession claims could be assessed would then be the extent to which the parent state violated that corpus of fundamental human rights in relation to those of its peoples claiming self-determination.⁵⁰⁵ Finally, although our analysis does not furnish a definitive answer to the question of whether or not self-determination is *jus*

502. *Supra* notes 162-64 & 404.

503. Meissner argues that their annexation was in any case prohibited by pre-1939 international law proscribing the use of force. Meissner, *supra* note 94, at 381. Sinha points out that their annexation in 1940 was in breach of specific 1920 peace treaties between each of the three states and the Soviet Union. Sinha, *supra* note 29, at 270.

504. See Laing, *supra* note 207, at 124-33, 141-46. See also the various instruments referred to in *id.* at 146-59.

505. Thus, this writer would provisionally find untenable the claim of Quebec separatists to secession from Canada.

cogens, there are extremely strong indications of this possibility, since of the three aspects of liberty,⁵⁰⁶ self-determination must be on the highest plane.

506. See generally Green, *supra* note 240.