Universal Declaration of Human Rights: Does It Have Enough Force of Law to Hold States Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice, The

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THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: DOES IT HAVE ENOUGH FORCE OF LAW TO HOLD “STATES” PARTY TO THE WAR IN BOSNIA-HERZEGOVINA LEGALLY ACCOUNTABLE IN THE INTERNATIONAL COURT OF JUSTICE?

I. INTRODUCTION

In the aftermath of World War II, the need to protect individual human rights became apparent. The very magnitude of the Holocaust atrocities forced the international community to realize the necessity for a standard of human rights that would be recognized as “universal” in nature.1 The international community emphasized this desire during the creation of the United Nations (U.N.) by prioritizing the establishment of a list of basic human rights. In the U.N. Charter (Charter), the drafters declared the U.N.’s purpose to be not only the maintenance of peace and security, but also the promotion of respect for human rights and fundamental freedoms.2 One problem with the Charter was that it did not go further in its definition of those rights and freedoms. The U.N., in 1947, gave the Commission on Human Rights (Commission) the job of drafting an international bill of rights, to establish those definitions.3

2. U.N. CHARTER art. 1. There are numerous references to human rights and freedoms throughout the Charter, but Article 1 is the most important because it delineates a purpose of the United Nations. The other references within the Charter are in support of Article 1.
3. Shestack, supra note 1, at 16. The Commission on Human Rights was established by the United Nations Economic and Social Council (UNESCO) in February, 1946. Its purpose was to submit “proposals, recommendations, and reports regarding:
Before drafting could begin, there were questions of precisely which rights were to be considered "universal" human rights. The western countries concentrated more on the individual rights of people, such as the freedoms of speech and religion; whereas, the countries under Soviet control felt that rights such as the right to work and the right to an education were more important. To reach common ground and to ensure that these fundamental rights were indeed universal in nature, all of these rights and freedoms were eventually considered together in drafting the document. By doing so, the enumerated rights would more likely meet with the approval and support of the U.N. General Assembly. The result would be a list of rights and freedoms that reflected the feeling of the international community as a whole — the Universal Declaration of Human Rights (Declaration).

However, when one considers the atrocities and violations of basic human rights and freedoms taking place in Bosnia today, the horrors of World War II, which the Declaration was designed to prevent, once again come to mind. In the case currently before the International

(a) an international bill of rights;
(b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;
(c) the protection of minorities;
(d) the prevention of discrimination on the grounds of race, sex, language or religion."

ROBERT E. ASHER ET AL., THE UNITED NATIONS AND PROMOTION OF THE GENERAL WELFARE 664 (1957) (quoting E.S.C. Res. 5(I), U.N. ESCOR, 1st Sess. (1946)). Its purpose was expanded "with the addition of a fifth item, as follows:
(e) any other matter concerning human rights not covered by items (a), (b),
(c), and (d)."

Id. at 665 (quoting E.S.C. Res. 9(II), U.N. ESCOR, 2d Sess. (1946)).

A drafting committee, consisting of Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom, and the United States, was created solely for the purpose of working on an international bill of rights. Id. at 664-65.

4. Shestack, supra note 1, at 16.
5. Id.
6. ASHER ET AL., supra note 3, at 666.
8. The current civil war in Bosnia-Herzegovina can be linked to the end of World War I when, in 1918, Bosnia joined what was then known as the Kingdom of Serbs, Croats, and Slovenes; and the new Yugoslavia became a single region made up of a mixture of these ethnic groups-Bosnia, Slovenia, Croatia, and Serbia. Following World War II, Yugoslavia came under communist leadership. In 1990, Bosnians voted their Communist leaders out of power. Then in February of 1992, the Muslim and Croat majority in Bosnia voted to leave Yugoslavia. In an effort to retain links with Serbia, the Bosnian Serb minority took up arms against the Muslims and Croats attempting to create a "Greater Serbia." The civil war is estimated to have left over 130,000 people killed or missing and over one million homeless as of May, 1993. Hatred, Territory Feed Bosnian War, WINDSOR STAR (Canada), May 13, 1993, at F1.
Court of Justice (ICJ) dealing with this situation,\(^9\) several provisions of the Declaration were cited as being violated by states who are party to the conflict,\(^10\) namely the Federal Republic of Yugoslavia (Yugoslavia) and Bosnia and Herzegovina (Bosnia-Herzegovina). Assuming that these rights were thoughtfully considered and put into writing because the international community wanted to guarantee that basic and fundamental rights would not be violated as they had been in the past,\(^{11}\) the international community and the Declaration are being put to a test. What is to be done about the horrors now taking place in Bosnia-Herzegovina? Should not the rights guaranteed in the Declaration be enforced?

This question is not easily answered since legal enforcement could be a problem. When the Declaration was created, it was done so merely as a declaration and was not considered to have the force of law.\(^{12}\) It was intended to be a guideline for individual states and regions to follow in adopting their own legislation in defense of fundamental human rights.\(^{13}\) However, has such a wide recognition of the document caused it to attain the status of customary international law\(^4\) and, thus, become a legitimate source of law for judicial tribunals to use in support of decisions and arguments? Or, is the document nothing more than a statement of principles and recommendations with no binding quality whatsoever?\(^5\) This comment will discuss to what ex-

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9. Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 325 (Provisional Measures Order of September 13) [hereinafter Bosnia Case]. The Republic of Bosnia and Herzegovina instituted proceedings in the International Court of Justice in March of 1993 against the Federal Republic of Yugoslavia. They have alleged that Yugoslavia has not only violated the Universal Declaration of Human Rights, but also that it has committed acts in violation of the U.N. Charter and the Geneva conventions, as well as the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. These proceedings were instituted to obtain an order from the ICJ to Yugoslavia to cease acts attributed to Bosnia-Herzegovina’s allegations.

The Genocide Convention also addresses a specific area of human rights: the “intent to destroy, in whole or in part, a national, ethnic, racial, or religious group,” ASHER ET AL., supra note 3, at 738 (quoting Genocide Convention); whereas, the Declaration is a much more general document, and members of the U.N. sometimes pay more homage to the Declaration than the Convention. *Id.* at 737-39.

10. Specifically, Bosnia-Herzegovina claims that Yugoslavia has violated, and continues to violate, Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, and 28 of the Declaration. Bosnia Case, 1993 I.C.J. at 326.


13. *Id.*


tent the Declaration has achieved the status of enforceable law with respect to the ICJ, and how it could play a role in holding individual states liable for violations of its provisions in the war in Bosnia-Herzegovina.

II. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

As a prerequisite to examining the enforceability of the Declaration and how it is used by the International Court of Justice, it is necessary to briefly discuss its history. This discussion will help with understanding how and why it has reached the stage at which it is today.

When the drafting committee of the Commission began work on an international bill of rights, three proposals were submitted to the Commission for consideration. The proposals differed in one important respect—their eventual legally binding character. The first proposal was a draft declaration setting forth general principles and was not intended to be binding by ratification. The second proposal was a draft convention that was intended to be binding on any state which ratified it. The third proposal dealt primarily with measures for implementing human rights. The Commission was divided on which direction to go, but in the end decided that the term “International Bill of Rights” would embrace all three of the proposals as a group. However, they chose to divide the group into two separate documents: the Universal Declaration of Human Rights, and the proposed Covenant on Human Rights (Covenant).

The next question was which of these two documents would be considered first. Because the proposed Covenant was intended to be a convention with legally binding power and would require ratification by states, some Commission members considered the Declaration to be (arguing that the Declaration has no power or force of law whatsoever, and is just a statement of what human rights should be in the eyes of the U.N.).

16. ASHER ET AL., supra note 3, at 665.
17. Id.
18. Id.
19. Id. at 666.
less important. This supported the Commission's desire to create an express legal document to which every nation that ratified it would be legally bound. The Declaration was nearly set aside as a secondary project to the proposed Covenant. However, a majority of the Commission opted to allow work on the Declaration to begin immediately and to postpone work on the proposed Covenant. The main reason for this was that the Declaration, unlike the proposed Covenant, would not require ratification. They felt that a document containing "declarations" of rights that did not require ratification to pass the General Assembly would be more easily and quickly passed through. This would then satisfy the U.N.'s more pressing desire to quickly establish a basic document of human rights.

This is not to say that the Commission had no hope of giving force to the Declaration in addition to the proposed Covenant. To the contrary, the drafters of the Declaration had originally hoped that what they put together would be legally binding from the start. However, they also knew that something needed to be done soon, even if it meant that the result would merely be a declaration and not have immediate legally binding effect. Regardless of time constraints, the drafters knew that the Declaration would be the most important part of the International Bill of Rights. A "declaration" did not require ratification, but would still have the approval of the U.N. behind it and would express what the ideals and aspirations of all of the member states were toward the rights of human beings in general. Thus, the Commission decided to begin with the project of putting together the Universal Declaration of Human Rights.

When the Commission began work on the Declaration, it was forced to consider many issues in creating such a far reaching agreement. It had to take into account differing political, religious, econom-

21. HUMPHREY, supra note 12, at 64.
22. Id.
23. Id. Many feared that if the Declaration was adopted first, the Covenant would never be adopted at all. This was the view of a small number of states, however, and ultimately the Declaration was completed first. The Covenant, in fact, was not adopted and opened for signature until 1966, and it was another ten years before it took effect. The reasons for this were mainly political, due to the atmosphere at the U.N. during the Cold War years. It would have been twenty or more years before the Declaration would have been passed had the Commission decided to postpone work on it until after the Covenant was completed. Id.
24. Id. John Humphrey, one of the drafters of the Declaration, stated that he knew that "[the Declaration] was not meant to be legally binding," but that his instinct told him that "eventually it would become part of international law whatever the intentions of its authors, or the form in which it was adopted." Id.
25. Id.
26. Id.
27. Id.
ic, social, and juridical ideas, as well as differing cultural patterns, from each country then a member of the U.N.\(^{28}\) Virtually every country submitted suggestions of rights from their own constitutions and national laws that they desired to see enunciated in the Declaration.\(^{29}\) In the end, the Commission approved a draft of the Declaration consisting of twenty-eight articles, narrowed down from the forty-eight originally requested,\(^{30}\) with no votes against and only four states abstaining.\(^{31}\) After consideration by the General Assembly, approximately eighty-six meetings worth of consideration and revision by the committee, and some debate by the Economic and Social Council,\(^{32}\) the General Assembly officially adopted the Universal Declaration of Human Rights without objection by a vote of forty-eight for, zero against, and only eight abstentions.\(^{33}\)

III. The Declaration and the International Court of Justice

To give international human rights law legitimacy and force, there must be a forum in which to bring disputes and enforce this law. Different forum courts exist on all levels, from individual state courts, to regional courts, such as the European Court of Human Rights,\(^{34}\) all the way up to the world court of the United Nations—the ICJ. All courts can and do use international human rights documents like the Declaration as authority for decision-making,\(^{35}\) but this paper will focus on the decision-making of the ICJ and what sources of law it can use in attempting to enforce basic human rights.

The ICJ frequently cites the Declaration as authority in its deci-

\(^{28}\) DROST, supra note 15, at 33; ASHER ET AL., supra note 3, at 666.
\(^{29}\) ASHER ET AL., supra note 3, at 666-67.
\(^{30}\) Id. at 666-67.
\(^{31}\) Id. at 668. The vote in the Commission was 12 to 0, and Byelorussia, the Ukraine, the Soviet Union, and Yugoslavia abstained. Id.
\(^{32}\) Id. at 668-69.
\(^{33}\) ASHER ET AL., supra note 3, at 669. "Although the eight delegations that abstained took strong exception to certain provisions in the Universal Declaration, . . . they apparently did not wish to cast a negative vote on this occasion." Id.
\(^{34}\) The European Court of Human Rights is a regional court that was created by the European Convention on Human Rights, both of which were introduced in response to the horrors of war in Europe in the 1930's and 1940's. The Court is vested with the function of ensuring the observance of the Convention, and it is an independent judicial institution whose judgments are final and binding. Rolv Ryssdal, The Future of the European Court of Human Rights, Public Lecture at King's College, London (Mar. 22, 1990) (transcript available in University of Tulsa College of Law Library).
\(^{35}\) Among those are federal courts of the United States. Although the courts make it clear that it is not a convention that the United States is on its face legally bound to uphold, they do concede that the Declaration has reached a point where it may be cited as a source of international human rights law. See Filartiga v. Pena-Irala, 630 F.2d 876, 880-82 (2d Cir. 1980); see also Fernandez v. Wilkinson, 505 F. Supp. 787, 795-97 (D. Kan. 1980).
sions, but what legal force does the Court give the Declaration? Can the Court actually enforce its provisions on a state such as Yugoslavia or Bosnia-Herzegovina? Before getting into that subject, it is necessary to give a brief description of the ICJ as a judicial organ of the U.N., and of the general types of law the ICJ is allowed to use in its decision-making process.

A. ICJ as an Organ of the United Nations

The ICJ was established as the principal judicial organ of the U.N. and replaced the Permanent Court of International Justice as the principle court of world affairs. The ICJ is bound to function in accordance with the Statute of the International Court of Justice (Statute). Also, as an organ of the U.N., the ICJ is bound to act in compliance with the Charter and operates in furtherance of its goals, the primary goal being the promotion of human rights and fundamental freedoms.

The security of such human rights and fundamental freedoms is considered to be the "least visible" arm of the U.N., in which the ICJ plays a large role. The Statute gives the ICJ jurisdiction over "all matters specially provided for in the Charter of the United Nations." Therefore, the ICJ is given the power to preside over matters of human rights and fundamental freedoms, provided the dispute is among "states."

36. U.N. CHARTER arts. 7, 92.

37. The Permanent Court of International Justice (PCIJ) was created at the time of the League of Nations. Upon the outbreak of World War II, the PCIJ was already very inactive, and it held its last public sitting on December 4, 1939. With the creation of a new world political organization, the U.N., consideration was also given to the creation of a new world court. It was thought that since the PCIJ was linked to the League, which was in dissolution and was considered a part of an old world order where European powers had dominated the affairs of the international community, then a new court should be created where all nations could play an influential role. THE INTERNATIONAL COURT OF JUSTICE 16-18 (The Hague 1976).

One of the main differences between the two courts would be that the new International Court of Justice would be directly linked to the new political body, whereas the PCIJ, although created by the League of Nations, was not a part of the League. The ICJ would be the "principle judicial organ" of the U.N. Id.

38. U.N. CHARTER, art. 7; The Statute of the International Court of Justice, May, 1947 [hereinafter Statute].

39. See supra note 2 and accompanying text.


41. Statute, art. 36, para. 1.

42. Id. art. 34, para. 1.
B. Sources of Law for the ICJ

Having established that the ICJ has the ability to decide disputes among states concerning human rights violations, it is necessary to discuss which sources of law it can turn to in making these decisions. Article 38 of the Statute sets out generally those sources of law the ICJ shall apply in deciding international disputes. These include international conventions, international custom, general principles of law recognized by nations, and, as subsidiary means of determining rules of law, judicial decisions and teachings of highly qualified and respected individuals.

The first category, international conventions or treaties, is the source of significant importance because it consists of documents expressly agreed to and signed by states and detail specifically the rules of law that apply to the contesting states. The ICJ is concerned here only with bilateral and multilateral contractual and law-making treaties, the most universal of which is the Charter of the United Nations. Because they have been specifically ratified and accepted as binding law by the states who are parties to them, treaties are considered more legally binding and effective than other sources of international law.

However, when a court wishes to apply a treaty to a decision, one of its restrictions is that the treaty is not binding on states who are not signatories to the document. Therefore, the ICJ can only use treaties

43. Id. art. 38, para 1. The sources listed in Article 1, excluding the fourth since it states itself that it is only “subsidiary” means, are not listed in any particular order of importance. Conventions, international custom, and general principles of law are all considered potential sources. Id.
44. Id.
46. Statute, art. 38, para. 1(a).
47. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 287 (July 18) (dissenting opinion of Judge Tanaka in a discussion of the sources of law under Article 38 of the Statute). The two countries initiating the action put forward allegations of contraventions of the League of Nations Mandate for South West Africa said to have been committed by South Africa, the administering authority. The question in the case was to what extent South Africa was obligated under the Mandate, if at all, if the Mandate is no longer in force. Id. at 17.
49. Jonathan I. Charney, Universal International Law, 87 AM. J. INT’L L. 529, 534 (1993). This may not necessarily be true, however, if the treaty, or certain provisions of it, have become part of customary international law or are recognized as generally accepted principles of law. HUMPHREY, supra note 12, at 73. Also, there is another type of treaty known as a “legislative” treaty that by definition is one that purports to determine law and obligations that would be incumbent upon other states that are not parties. DAVID OTT, PUBLIC INTERNATI-
as a source of law in specific cases rather than apply them as general law to the international community as a whole. This is one of the primary contentions used to dispute the legal force of the Declaration since it has not been ratified, nor was it intended to be. However, arguments exist that are contrary to this proposition, and will be discussed later in further detail.

The next two categories, international custom and general principles of law recognized by nations, are not as easily discernable since there is no ratified document, and often no document at all, but only "practice" by nations. These categories primarily consist of either declarations of standards or beliefs that have been accepted or agreed to by a majority of nations, or practices by nations that are common to a majority of them and are recognized as such. These two different sources are enumerated separately in the Statute, but are so similar in their meanings that the distinction between them is becoming less clear. The argument regarding the legal force of the Declaration as customary international law is quite strong and will also be discussed later in more detail.

As for the final source of law allowed by the Statute, judicial decisions of international tribunals are regarded merely as authoritative evidence of the state of the law. Even with regard to its own past decisions, the ICJ was intended only to apply the law and not to make it; therefore, precedence has no authoritative place in the decision-making process of the ICJ. Judicial decisions are only persuasive and are looked at merely as evidence of the current state of the law. The same can be said of writings of publicists.

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50. See supra note 11 and accompanying text.
51. South West Africa, 1966 I.C.J. at 291 (dissenting opinion of Judge Tanaka). Judge Tanaka stated that as to the creation of customary international law, the consent of all states is not required. If Article 38, paragraph 1(b), of the Statute were meant to allow the contrary view of a particular State or States to prevent the creation of customary law, then it would result in the permission of obstruction by veto, and this could not have been the intent of the drafters of Article 38. Id.
52. Id. A general practice is "the result of the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law. Such repetition of acts is an historical process extending over a long period of time." Id.
55. Id. at 20.
56. Id. at 25.
Therefore, the Declaration must fall under two possible sources of law allowed by the Statute if it is to have binding effect for the ICJ. It must be either a treaty or international customary law.

C. The Declaration as a Source of Law

The first argument in support of using the Declaration as a source of law in international human rights decision-making is that it is an extension of the Charter and, therefore, to be treated as a convention with binding effect on the member states of the U.N. The second, and stronger, argument is that the Declaration and what it embodies has reached the status of customary international law and is equally binding as a source of international human rights law.

1. As an Extension of the Charter

One argument supporting the proposition that the Declaration is legally binding is that the declaration is essentially an extension of the Charter and, thus, has the same authority. Article I of the Charter states clearly that one of the main purposes of the U.N. involves "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Although these distinctions are mentioned generally, the Charter does not elaborate on specific rights and freedoms in these areas. Because such emphasis has been placed on rights and freedoms by the U.N. without defining them in the Charter, it has been argued that the Declaration constitutes an extension of the Charter by outlining and specifying what rights and freedoms are to be promoted. It sets out in detail one of the principal aims of the U.N.

The preamble to the Declaration declares that “Member States

57. U.N. CHARTER art. 1, para. 3.
58. In addition to article 1, the promotion of rights and freedoms is mentioned a number of times throughout the Charter: (a) article 13, paragraph (b) under chapter IV setting out the General Assembly, (b) article 55, paragraph (c) under chapter IX discussing international economic and social co-operation, (c) article 62, paragraph 2 under chapter X setting up the Economic and Social Council, and (d) article 76, paragraph (c) under chapter XII setting up the international trusteeship system.

However, these also do not go into any specifics about what rights and freedoms are involved. See generally U.N. CHARTER.

59. DROST, supra note 15, at 32-33.
60. Id. at 33. “It elaborates on the Charter and gives a definition of substance. It expresses the spirit of the Charter by setting out in detail what in the Charter itself was already included as one of the principal aims and purposes of the United Nations.” Id.
have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms. It also declares that "common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge." These two phrases read together have been interpreted to make the Declaration, together with the Charter, a source of international law. Article 56 of the Charter, in conjunction with Article 55, created a "pledge," or a legal obligation, on the part of the Member States to achieve the goals of respect for and observance of human rights and fundamental freedoms. And, as stated earlier, the Charter does not clarify these rights and freedoms. It is the Declaration that does this. The proposition is, then, that the Declaration refers back to the Charter, and thus the Member States have expressly accepted the obligations set forth in the Declaration.

The General Assembly itself considers the Declaration to be the "law of the United Nations." Even John Humphrey, one of the drafters of the Declaration, intended that it "would apply to all states and would have the great authority of the United Nations behind it." During the General Assembly debates preliminary to the approval and adoption of the Declaration, a number of states voiced their belief that those who signed the Charter would be bound by the Declaration "as if they had signed a convention embodying those principles." China asserted that the Declaration "explicitly" stated the rights alluded to in the Charter. France considered it "an authoritative interpretation of the Charter." Chile stated that a violation of the Declaration would be a violation of the Charter.

The ICJ has also elaborated slightly on the argument that the Declaration is an extension of the Charter. It declared that the Charter's affirmation of faith in fundamental human rights is "taken further" in the Declaration. This could indicate that the ICJ is using the Declaration

61. Universal Declaration, supra note 7, at pmbl.
62. Id.
64. U.N. CHARTER art. 55, para. c, art. 56.
66. Id. at 54.
68. HUMPHREY, supra note 12, at 64.
69. Id. at 73.
70. Id.
71. Id.
72. Id. at 73-4.
73. Application for Review of Judgment No. 158 of the United Nations Administrative
to clarify the Charter.

The ICJ has also, in numerous opinions involving human rights issues, including the one at issue concerning Bosnia-Herzegovina, invoked the Charter and the Declaration together. In its application to the Court, Bosnia requested the ICJ to declare that Yugoslavia had violated nearly every provision of the Declaration and Article 1(3) of the Charter. This invocation of the Charter and the Declaration together lends strength to the argument that the Court may view them as dependent upon each other. In its order granting preliminary measures at the request of the Republic of Bosnia and Herzegovina, the Court invoked "the rights of the People of Bosnia and Herzegovina to life, liberty, security, and bodily and mental integrity, as well as the other basic human rights specified in the 1948 Universal Declaration of Human Rights" as "legal rights" to be protected. The ICJ clearly used the Declaration as a basis for making its determination.

To summarize, Article 1 of the Charter essentially provides the basis for the promotion of human rights and the authority for the U.N. to act on them. The Declaration provides a detailed list and explanations of those rights declared to be "human rights." In this respect, the Declaration is essentially the explanation of Article 1, and could therefore have the same authority for the U.N. to act upon as the Charter itself. If this argument is valid, then the ICJ would have authority to use the Declaration, in conjunction with the Charter, as a source of binding international law under Article 38(1)(a) of the Statute as an international convention.

2. As Law of International Custom

An even stronger argument as to what force the Declaration should be given by the ICJ is that it is now a part of customary international law. Violations of certain human rights are violations of international law if those rights have achieved the status of customary law.

Customary international law is defined generally as resulting "from a general and consistent practice of states followed by them from a

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Tribunal, 1973 I.C.J. 166, 291 (July 12).
76. Id. at 326-27.
77. Id. at 343.
78. Id.
79. See generally Charney, supra note 49, at 536-42 (discussing thoroughly customary law and its many rules regarding acceptance by states, exemptions, rules of acquiescence, and many other topics).
80. Hall, supra note 14, at 53.
sense of legal obligation.” The Statute of the International Court of Justice defines international custom “as evidence of a general practice accepted as law.” The ICJ elaborated on this by requiring that the rule invoked “is in accordance with a constant and uniform usage practiced by the States in question,” and that “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”

Given that the Declaration has not yet been fully accepted in its entirety by some states, it is significant that if established as customary international law, the Declaration would be binding on all states, not just those who recognize it as such. As long as the international “community” has accepted the principle as customary, it does not matter if every state individually has accepted the particular principle. As to how long it takes before a norm is considered to become customary, there is no set rule. This development may happen quickly or over a period of time, but obviously the longer its development, the stronger it appears.

Essentially, the development of customary international law can be divided into four factors, or prerequisites: generality of practice, uniformity of practice, opinio juris, and the duration of development. These factors are not written down in legal form, so strict

82. Statute, art. 38, para. 1(b).
83. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20). This case involved a dispute between the two countries that arose following a request by the Columbian embassy in Lima, Peru for the safe delivery of a Peruvian national who was requesting asylum in Columbia. The dispute was over how to interpret an agreement between the two countries concerning asylum. Id. at 272-74.
84. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20). The case concerned the delimitation of the boundaries of the continental shelf beneath the North Sea. An agreement could not be reached between the parties, and the question was submitted to the ICJ to determine which principles and rules of law were applicable. Id. at 17-28.
85. Meron, supra note 53, at 3; see also Humphrey, supra note 12, at 73.
86. Charney, supra note 49, at 536.
87. Id.
88. Gunning, supra note 48, at 214.
89. This relates to whether a practice is fairly widespread among a majority of states in differing regions of the world, as opposed to a minority of states or just one area of the world. Ott, supra note 49, at 16.
90. This means that “the practice of states should not vary greatly from state to state.” Id.
91. This means that the practice arises out of a legal obligation to do so, as opposed to a political or moral obligation. Id. at 15.
92. This is obviously “the length of time a practice has been followed” in the manners set
adherence to one or all is not absolutely required. However, because they are considered the general prerequisites for the establishment of customary international law, this comment will discuss them all for the purposes of examining the Declaration.

The first prerequisite is generality of practice. When the Declaration was initially adopted by the General Assembly, forty-eight states voted in favor of it and none against it, with only eight states abstaining. The Declaration has also been invoked in numerous Security Council resolutions, General Assembly resolutions, other international tribunal opinions, international treaties, and national constitutions. Most importantly, it has been invoked by the ICJ, which will be discussed in more detail in the next section. It has even been invoked in treaties signed by states who abstained in its original vote of approval. Significant, too, are the thousands of instances per year when the Declaration is invoked by individuals who contact the U.N. with claims of human rights violations. All of these instances indicate that state practice of invoking, and thus adhering to (technically, if not practically), the Declaration has risen to the level of general state practice.

This blends with the second prerequisite of uniformity. By invoking the Declaration as it is written, either by specific provision or by general statements such as “in accordance with the Universal Declaration of Human Rights,” indicates that state practice of adhering to the principles as they are set out in the Declaration has been uniform in nature. Thus, the number of times and the manner in which the Declaration has been invoked is strong evidence of the practice of states demonstrating international assent sufficient to argue that its practice is both general and uniform in nature.

In considering the third prerequisite of opinio juris, the reasons for
adhering to the Declaration’s principles, as well as the forms in which it is used (constitutions, treaties, court briefs and opinions, etc.), may demonstrate that it is invoked out of a “legal” obligation to do so. However, this is a very difficult factor to consider, and is criticized for being nearly impossible to determine.\textsuperscript{99}

The final prerequisite, duration, is also not strictly adhered to. There is no set length of duration required before a practice becomes international custom.\textsuperscript{100} The ICJ has stated that even a short duration could be sufficient if the practice has been extensive and virtually uniform.\textsuperscript{101} In the case of the Declaration, it has been in effect since 1948 and has been invoked consistently since then, as pointed out previously. Therefore, the duration of its development arguably satisfies this prerequisite.

Considering these factors, then, the Declaration has arguably reached a point of being customary international law. Assuming this argument to be valid, the ICJ would have authority to use the Declaration as a source of binding international law under Article 38(1)(b) of the Statute.

\textbf{D. Applications of the ICJ}

Before making this conclusion and determining that the ICJ can effectively enforce the Declaration against Yugoslavia and/or Bosnia-Herzegovina based on principles of international law, we must first consider what the ICJ has done with regard to the treatment of the Declaration in the past. Although the ICJ is not obligated to follow precedent, it is nonetheless important to consider the Court’s reasoning in other cases, in order to determine the directions it has taken and how it is likely to act in the future.

The ICJ has on numerous occasions cited the Declaration in its opinions and decisions as a source of authority in the area of human rights.\textsuperscript{102} It is interesting to note how the degree of authority that the ICJ has given the Declaration has gradually changed over the years since its adoption. The ICJ has never publicly announced that the Declaration is a legally binding instrument. Quite the contrary, in the

\textsuperscript{99} See supra note 91 and accompanying text. In order to determine whether a state is doing something out of a legal obligation to do so, one must decide if it is “conscious” of its duty to do so. \textit{Ott}, supra note 49, at 15. This theory is criticized because it requires consideration of an essentially psychological viewpoint. \textit{Id.} Can a state have a psychological viewpoint as if it were a real person?

\textsuperscript{100} \textit{Ott}, supra note 49, at 15-16.


\textsuperscript{102} See infra notes 104-121 and accompanying text.
South West Africa case of 1966, the court held that "[h]umanitarian considerations may constitute the inspirational basis for rules of law," but they do not themselves constitute sufficient expression in legal form "[amounting] to rules of law" such that the ICJ can use them in rendering decisions. In his dissenting opinion, however, Judge Tanaka went into an examination of the sources of law enumerated in Article 38 of the Statute. He concluded that although the Declaration "is no more than a declaration adopted by the General Assembly and not a treaty binding on the member States," as to the area of customary international law, the Declaration does constitute evidence of the application of the human rights provisions of the Charter. Therefore, it was Judge Tanaka's belief that the rules outlined in the Declaration have become rules of customary international law.

Five years later, in Legal Consequences for States of the Continued Presence of South Africa in Namibia (Legal Consequences), another phase of the case dealing with South West Africa, the ICJ used the Declaration as one of three main sources of law in rendering its opinion. While the two main sources were South Africa's Mandate for Namibia, which was the document at issue, and the Charter of the U.N., they cited the Declaration as a third important document and source of international law. In discussing the General Assembly's revocation of the Mandate, the Court stated that the revocation was

104. Id. at 34.
105. Id. The Court rejected the suggestions that humanitarian considerations in and of themselves are sufficient to be used as rules of law, and took a very strict view of what constitutes "rules of law" in the international arena. Id. It is important to consider that the year was 1966, and the Declaration had only been in effect for 18 years. Up to this point, it had only been mentioned in I.C.J. opinions twice: first in the Asylum Case and then in the Nottebohm Case. Both times, it was only mentioned as a reference to specific rights of individuals in dissenting opinions. Asylum (Colom. v. Peru), 1950 I.C.J. 266, 290 (Nov. 20); Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 63-64 (Apr. 6). This case concerned a German national who lived in Guatemala. After Germany invaded Poland, he applied for and received citizenship in Liechtenstein. He was later deported from Guatemala and interned in the United States as an enemy alien. After the war, Guatemala would not let him back. Liechtenstein brought this action against Guatemala on his behalf for abuses of his human rights. Id. at 16.
107. Id. at 288.
108. Id. at 293.
109. Id.
110. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21) [hereinafter Legal Consequences]. This is another in the series of proceedings of the South West Africa cases.
111. Id. at 71.
explicitly based on three grounds relating to "international instruments of the first importance," referring to the three instruments mentioned above. The General Assembly thus determined that the Declaration was authoritative in providing a basis for its decision.

As an organ of the U.N., it was then up to the ICJ to determine, one way or the other, this same issue. In discussing the "evolution of modern international law which is taking place in the United Nations through the implementation and the extension to the whole world of the principles of equality, liberty and peace in justice which are embodied in the Charter and in the Universal Declaration of Human Rights," the Court said it could not omit consideration of the Declaration as a ground for the Mandate's termination. And, by referring to the Declaration, the ICJ "has asserted the imperative character of . . . the human rights whose violation by the South African authorities it has denounced."

The ICJ further stated in this case that the Declaration is not binding as a treaty under Article 38, paragraph 1(a). However, it said that the Declaration is binding on States on the basis of custom, either because it constitutes a codification of customary law, or because it has acquired the force of custom through a general practice accepted as law. So, within the five years between the two cases dealing with South West Africa, the ICJ's view of the Declaration developed into its use as an authoritative source of international law.

As time progressed and the importance and respect for human rights increased, the number and frequency of cases increased where the ICJ cited the Declaration as competent authority in support of an argument. By 1987, the ICJ was looking upon the Declaration as a document containing basic principles of law, and concrete expres-
sions of established principles of human rights in the modern law of nations. Thus, the ICJ has consistently increased its use of the Declaration as a source of law in supporting its decisions. Can this trend be expected to continue into the near future should the ICJ be faced with attempting to enforce the Declaration against Yugoslavia or Bosnia-Herzegovina?

IV. FUTURE ENFORCEMENT OF THE DECLARATION

For enforcement to be possible, a “state” member of the U.N. would have to initiate proceedings against another “state” member. This is the only way the ICJ can assert jurisdiction since it has none over individuals. In an attempt to prosecute “individuals” responsible for violations of human rights in Bosnia, the U.N. Security Council set up an international war crimes tribunal, the first of its kind since the Nuremberg trials of Nazi war criminals following World War II.

This is an important and aggressive step toward upholding basic human rights, but what of the responsibility of the states involved? Much of the war effort on the part of the Bosnian Serbs has been, and continues to be, supported and controlled by Yugoslavia. And, similarly, the Bosnian Army is the state army of Bosnia-Herzegovina. Thus, the two states should be held accountable for their actions in conducting a war where human rights are disregarded.

121. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177, 211 (Dec. 15) (separate opinion of Judge Evensen). This case concerned a disagreement between Romania and the U.N. on the applicability of a provision of the Convention on the Privileges and Immunities of the United Nations, a document dealing with staff members of the U.N. A Rumanian national was the designated rapporteur of the Sub Commission on the Prevention of Discrimination and the Protection of Minorities and was to issue a report to the Sub Commission on a given topic. He reportedly fell ill and was unable to complete his report on time. During the time of his “illness,” the Rumanian government would not allow anyone from the U.N. to see him. The dispute arose as to the status of the man under the above Convention when he is in his own country; i.e. whether he has any rights under the Convention. Id. at 179-87.

122. Statute, art. 34, para 1.


124. With the signing of the London Charter, the act by which the Allied powers of World War II provided for the establishment of a tribunal for the punishment of major war criminals, the first international tribunal for the prosecution of war crimes was created. Like this tribunal, the one established by the Security Council for crimes in the war in Bosnia will likely have a major effect on international human rights law as it relates to individual applications. SECTION OF INTERNATIONAL LAW AND PRACTICE, AMERICAN BAR ASSOCIATION, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 5-8 (1993).
If the Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide continues to a point of attempted enforcement of a judgment against one or both of the states, then it would be possible to use the Declaration as a legitimate source of law in support of such a judgment. Enforcing the Genocide Convention would obviously be highly beneficial itself; but what of all the other human rights abuses not directly addressed by the Convention? It would be necessary to use the Declaration as a basis for judgments involving these other types of abuses.

The ICJ has gone from being in a position not quite ready to declare the Declaration as having some force of international law\(^{125}\) to a position of feeling comfortable enough to consistently cite the Declaration as a source of international law as it pertained to a specific case.\(^ {126}\) Judge Tanaka’s dissenting opinion in the South West Africa case of 1966\(^ {127}\) became the court’s opinion by the time of the Legal Consequences case.\(^ {128}\) The ICJ was showing signs of recognizing the Declaration as international law. This became more and more evident in later years, as the ICJ began citing the Declaration consistently in human rights cases. This is the main human rights document cited most often by the ICJ in its opinions and judgments in matters of human rights or fundamental freedoms.

What type of international law the ICJ considers the Declaration can be argued differently. Most scholars will argue that it is recognized as customary international law, simply from the fact that it is cited so often by the ICJ and invoked so often in legally binding treaties and constitutions.\(^ {129}\) It has existed for over forty years and is more recognized as a basic list of human rights than ever before. By the manner in which states invoke the Declaration, either in treaties, in national instruments, or in other international documents, it is evident that the majority, if not all, states treat the document as a legal norm. When the ICJ takes all of this into account, it can only come up with the conclusion that the Declaration is now a part of customary international law.

If the trend continues, future decisions by the ICJ will treat the Declaration as legally binding on all states. The document will be considered a direct source of international law allowed under Article 38 of the Statute. Essentially, the ICJ will have no option but to use the Declaration as binding law, because once it has begun recognizing it as

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125. See supra text accompanying note 105.
126. See supra text accompanying notes 110-11.
127. See supra text accompanying notes 106-09.
128. See supra text accompanying notes 110-18.
129. See supra note 94 and accompanying text.
binding law, it must continue in that regard unless its provisions are nullified by a subsequent rule of international law stating otherwise. This, however, is unlikely in the view of the international community today. The Declaration is considered to be the embodiment of basic and inalienable human rights. These are not likely to be easily changed by any state or tribunal such as the ICJ.

In considering the case concerning Bosnia, the ICJ has already declared to both sides to the dispute that certain rights are guaranteed by the Declaration. Aside from the Convention on the Prevention and Punishment of the Crime of Genocide, the ICJ based its preliminary order on the Declaration as a legally binding international instrument. If it continues in this manner with respect to future proceedings on this case, it will necessarily base its final judgment, at least in part, on the Declaration, along with the above mentioned Convention. Even if the Convention did not exist as a source of law for the specific area of genocide, the ICJ would be legally able to cite the Declaration as legal authority in making its judgment.

V. CONCLUSION

The Declaration, although adopted without the intent of being a legally binding instrument, has achieved the status of international law. It embodies basic human rights and freedoms that are inalienable and are themselves considered general principles of law. The document was created in furtherance of the purposes of the United Nations in promoting human rights and fundamental freedoms, and has since become part of the general practice of individual states and the international community as a whole. In this respect, it is now a part of customary international law and will remain so until the international community determines otherwise. States, not just individuals, must abide by the rights and freedoms set forth in the Declaration and should be held accountable for violation of such rights and freedoms. In this way alone can the meaning of the Declaration and the desire of the international community be legitimized.

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