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NOTES AND COMMENTS

Recognizing Self-Determination in International Law: Kuwait's Conflict with Iraq

I. INTRODUCTION

Different groups of people in the twentieth century have justified their claims for nationhood based on the right of "self-determination."¹ However, despite these recurring claims of self-determination, no clear international legal standards exist for this extremely subjective right. Although the right of self-determination has been applied inconsistently to various groups of claimants, the United Nations Charter and General Assembly resolutions, International Court of Justice opinions, and journal publications provide general principles with respect to self-determination.²

This Comment analyzes whether a group that is separated ille-

1. See MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 23 (1982); see also Malvina Halberstam, *Self-Determination in the Arab-Israeli Conflict: Meaning, Myth, and Politics*, 21 N.Y.U. J. INT'L L. & POL. 465, 468 (1989) ("Almost all states support the 'right' to self-determination by some groups but oppose such claims by others."). For example, the Serbs in Yugoslavia, the Tartars in Crimea, and the Armenians in Azerbaijan have been unsuccessful in invoking their rights to self-determination. *Id.* at 467. Britain and Canada have refused repeatedly to yield to the rights of Ireland and Quebec, respectively. *Id.* at 468. In addition, the Palestinians are still without a homeland in the Middle East. *Id.*; see also Marilyn J. Berliner, Comment, *Palestinian Arab Self-Determination and Israeli Settlements on the West Bank: An Analysis of Their Legality Under International Law*, 8 LOY. L.A. INT'L & COMP. L.J. 551 (1986). Despite the setbacks of these groups, which represent only a small number of the groups that continually attempt to obtain self-determination, most of the colonized Third World nations were granted independence after World War II. *Id.* at 557.

2. See, e.g., U.N. CHARTER arts. 1, ¶ 2, 55, 73, 76; see also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970); *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966); *The Situation with Regard to Implementation of Declaration on Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1654, U.N. GAOR, 16th Sess., Supp. No. 17, U.N. Doc. A/L.366, adden. 1-3 (1961); *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960); *The Right of Peoples and Nations to Self-Determination*, G.A. Res. 637, U.N. GAOR, 7th Sess., Supp. No. 20, U.N. Doc. A/2361 (1952); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security

gally from a foreign nation claiming sovereignty over it is entitled to invoke self-determination against that foreign nation once the group has effectively developed into an independent state. This Comment first defines the principle of self-determination and discusses its validity in international law. Second, it explains the characteristics a group must possess in order to constitute a "self." Next, this Comment describes the prerequisites for a valid claim of self-determination. This Comment also elucidates the various forms in which self-determination can manifest itself, as well as the factors that decide which particular form applies to a specific claimant group. Finally, by applying these sub-issues of self-determination to a contemporary example, this Comment suggests that the question presented requires an affirmative answer.

II. SELF-DETERMINATION

A. *The History and Meaning of Self-Determination*

Self-determination is not easily defined, because the international community applies the principle inconsistently.³ Essentially, self-determination connotes "the right of a people to decide upon its own form of government, without coercion or outside influence."⁴ As a legal principle, self-determination has evolved through Kantian philosophy and the Enlightenment era to the League of Nations and United Nations of the twentieth century.

1. Origin of the Definition

The notion of self-determination originated from Kantian philosophy.⁵ Immanuel Kant, the renowned eighteenth century philosopher, defined self-determination without regard to peoples and

Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21) [hereinafter *Namibia*]; Western Sahara, 1975 I.C.J. 12 (Oct. 16).

3. See Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459 (1971).

Any examination of self-determination runs promptly into the difficulty that while the concept lends itself to simple formulation in words which have a ring of universal applicability and perhaps of revolutionary slogans, when the time comes to put it into operation it turns out to be a complex matter hedged in by limitations and caveats.

Id.; see also Halberstam, *supra* note 1, at 466.

4. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1646 (2d ed. 1977); see also Darlene M. Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, 44 U. TORONTO FAC. L. REV. 1, 2 (1986) ("At its core, self-determination involves the right of people to control their own destiny, free from alien rule.").

5. Edward M. Morgan, *The Imagery and Meaning of Self-Determination*, 20 N.Y.U. J. INT'L L. & POL. 355, 357 (1988).

nations.⁶ Instead, he wrote that every individual shares the "ability to avoid egotistical impositions on others."⁷ Kantian self-determination recognizes the right of an individual to be free from the egotistical impositions of others.⁸ As such, under Kantian thought, the taking of or "assault" on the property of another is impermissible.⁹

Despite this early Kantian basis, the concept of self-determination found its way into Enlightenment thought.¹⁰ It was defined with respect to nations and peoples, and became the "philosophical basis for the American and French Revolutions."¹¹ Later, self-determination was associated with the nationalist movements of the late nineteenth and early twentieth centuries.

2. World War I Transformation of the Definition

Following World War I, United States President Woodrow Wilson, responding to the threat of nationalism, introduced his version of self-determination.¹² President Wilson equated self-determination with democracy.¹³ He believed not only that all people possessed the right to determine their own form of government, but also that a democratic government was necessary to preserve this right.¹⁴ President Wilson's February 11, 1918, address reflected this notion: "National aspirations must be respected; people may now be dominated and governed by their own consent. 'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will

6. *Id.*

7. *Id.* (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 12-13 (John Ladd trans., 1965)). "In Kantian thought, it is the ability of persons to independently translate their arbitrary impulses and desires into action through rational thought that defines their juridical existence as holders of legal right." *Id.*

8. *Id.* at 358.

9. *Id.*

10. The Enlightenment was an intellectual movement concerned with the interrelated concepts of God, reason, nature, and man. It claimed wide support among European intellectuals in the seventeenth and eighteenth centuries. The Enlightenment attacked the established ways of European life and played a major role in the downfall of various European monarchies of the time. 6 *NEW ENCYCLOPAEDIA BRITANNICA* 887-94 (15th ed. 1977); see also JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (C.B. Macpherson ed., 1980).

11. 6 *NEW ENCYCLOPAEDIA BRITANNICA*, *supra* note 10, at 892 (discussing Lockean thought in the Enlightenment era); see also LOCKE, *supra* note 10, at 8-14; Johnston, *supra* note 4, at 3 (arguing that the theories of self-determination, democracy, and nationality developed together to provide a philosophical basis for these revolutions (citing OZI UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* 6 (1972))).

12. Berliner, *supra* note 1, at 552.

13. POMERANCE, *supra* note 1, at 3.

14. *Id.*

henceforth ignore at their peril."¹⁵ Moreover, one of President Wilson's fourteen points "urged recognition of the 'interests of populations concerned' in any future colonial settlements."¹⁶

However, President Wilson's Secretary of State, Robert Lansing, cautioned that universal application of an inadequately defined principle amounted to "political dynamite."¹⁷ President Wilson's idealistic nature, exemplified by his belief that the League of Nations could secure world peace, blinded him to realistic and practical considerations regarding the prospect of self-determination at the Versailles Peace Conference.¹⁸ The Peace Conference transformed the Wilsonian concept of self-determination into a political tool.¹⁹ For example, the World War I Allies employed self-determination to legitimize the newly formed states carved out of the disintegrated German, Russian, Ottoman, and Austro-Hungarian empires.²⁰

The Allied powers took over former territories of these defeated empires and established a mandate system that implicitly embodied the principal of self-determination. This system freed the peoples living under the alien subjugation of these defeated empires.²¹ Under the mandate system, the League of Nations assigned member states the obligation to act as mandatory power. The mandatory power

15. Johnston, *supra* note 4, at 3 (citing Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 781 (1975-76)).

16. Robert A. Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1975 DET. C.L. REV. 71, 72. President Wilson introduced the "fourteen points" as the basis for the Versailles Peace Settlement. 12 NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 10, at 692.

17. Friedlander, *supra* note 16, at 72; *see also* POMERANCE, *supra* note 1, at 2.

18. The Versailles Peace Conference officially ended World War I, as the victorious Allied powers forced the defeated empires to sign a peace treaty and yield to other various demands. POMERANCE, *supra* note 1, at 1-8.

19. *See* Friedlander, *supra* note 16, at 73 (describing the resulting League of Nations mandate system as a compromise between "Wilson's idealism and the harsher realities of international power politics"); *see also* Berliner, *supra* note 1, at 553 (stating that the Versailles Peace Conference treated the principle of self-determination as merely a political factor).

20. Emerson, *supra* note 3, at 463.

At the close of World War I, Woodrow Wilson and others proclaimed the right of self-determination in universal terms, but for all practical purposes with a concentration on the European territorial settlement following the war. In substance this involved particularly the destiny of the peoples in Eastern Europe, the Balkans, and the Middle East who were directly affected by the defeat or collapse of the German, Russian, Austro-Hungarian, and Turkish land empires.

Id. *See also* Friedlander, *supra* note 16, at 73; Johnston, *supra* note 4, at 3; Berliner, *supra* note 1, at 553; POMERANCE, *supra* note 1, at 5. For example, the Allies restored Poland and established several new states in Europe by employing the principle of self-determination. Berliner, *supra* note 1, at 553-54 n.13; POMERANCE, *supra* note 1, at 5.

21. Berliner, *supra* note 1, at 554 n.13; *see also* POMERANCE, *supra* note 1, at 5.

served as trustee "for the benefit of the inhabitants," rather than as sovereign over the territories.²² The mandate system recognized the rights of the peoples in these territories and provided for their "well-being and eventual independent existence."²³ However, unlike its application to the defeated nations' colonies, the principle of self-determination was not applied, and was not intended to apply, to the Allied powers' colonies.²⁴

The post-World War I era saw the initial transformation of the self-determination principle. It changed from a right of all peoples into a right of "politically shapeless ethnic communities, nations or nationalities primarily defined by language and culture" to determine their own form of government when controlled by alien subjugation, domination, or exploitation.²⁵

3. World War II Transformation of the Definition

The principle of self-determination further evolved with the close of World War II and the subsequent establishment of the United Nations. During this period, self-determination provided the justification for decolonization.²⁶

Self-determination under the United Nations Charter reflected the notion that "the sole consideration [of sovereignty] was the existence of a political entity in the guise of a colonial territory."²⁷ Hence, the artificial boundaries placed on former colonies became the boundaries of these new states, and the self-determination principle was used as a tool to obtain international peace.²⁸ As delineated in chapters XI and XII of the United Nations Charter, the International Trusteeship System reflects the principle of self-determination.²⁹ The Trusteeship System was established to:

promote the political, economic, social, and educational advancements of the inhabitants of the trust territories, and their progres-

22. Berliner, *supra* note 1, at 554.

23. Johnston, *supra* note 4, at 3.

24. See Friedlander, *supra* note 16, at 71, 73.

25. Emerson, *supra* note 3, at 463; see also Debra A. Valentine, Comment, *The Logic of Secession*, 89 YALE L.J. 802, 805 (1980).

26. See Berliner, *supra* note 1, at 557; see also Emerson, *supra* note 3, at 463-64; Valentine, *supra* note 25, at 804.

27. Emerson, *supra* note 3, at 463; see also Malcolm Shaw, *The International Status of National Liberation Movements*, 5 LIVERPOOL L. REV. 19, 20 (1983) (stating that chapters XI and XII of the United Nations Charter reflect the principle of self-determination).

28. See U.N. CHARTER arts. 1, ¶ 2, 55.

29. Shaw, *supra* note 27, at 20.

sive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.³⁰

Thus, self-determination changed over time from a simple philosophy for individuals into a principle governing relations among peoples and nations. The latter definition further evolved from the Wilsonian concept, linking self-determination to democracy, into the post-World War II justification for nationhood among non-self-governing territories.

Today, self-determination encompasses the right of a people to determine its political, cultural, economic, and social institutions, free from alien influence.³¹ This modern concept raises several important questions.³² First, is self-determination a legal right or a moral right? Second, who may exercise the right and under what circumstances? Finally, what forms can self-determination take?

B. *The Nature of the Right of Self-Determination*

Debate over the effect of self-determination in international law centers around the issue of whether it is a legal right or a moral right. The United Nations Charter and General Assembly resolutions, International Court of Justice decisions, various state practices, and the modern scholarly trend support the idea that self-determination embodies a legal right.³³

The United Nations Charter describes self-determination as a principle that guides international relations.³⁴ This principle imposes

30. U.N. CHARTER arts. 73, ¶ b, 76, ¶ b.

31. See *supra* note 4 and accompanying text.

32. See Michla Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal*, 19 ISR. L. REV. 310 (1984); see also Halberstam, *supra* note 1, at 466; Emerson, *supra* note 3, at 459.

33. Nathaniel Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WISC. INT'L L.J. 51, 54 (1988); see also Friedlander, *supra* note 16, at 74 (stating that some commentators argue that self-determination is a fundamental legal principle of the law of nations, based on the United Nations Charter and subsequent resolutions); Shaw, *supra* note 27, at 20-21; Johnston, *supra* note 4, at 6 ("The cumulative effect of these international instruments has been to establish self-determination as a norm in international law."); Michael S. Carter, *Ethnic Minority Groups and Self-Determination: The Case of the Basques*, 20 COLUM. J.L. & SOC. PROBS. 55, 57-59 (1986); Pomerance, *supra* note 1, at 63. But see Halberstam, *supra* note 1, at 468-70; Emerson, *supra* note 3, at 459-63; Friedlander, *supra* note 16, at 74 (pointing out criticisms of the argument that self-determination is a legal right).

34. U.N. CHARTER art. 1, ¶ 2. Article 1 of the United Nations Charter states that one of the purposes of the United Nations is to "develop friendly relations among nations based on

obligations on member states to respect the "political aspirations of the peoples" of non-self-governing territories.³⁵

Although the United Nations Charter defines self-determination as merely a "desirable" principle, United Nations resolutions have elevated self-determination to an international legal right.³⁶ In 1952, the United Nations General Assembly passed Resolution 637, which states in its preamble that self-determination is a "right."³⁷ In 1960, the General Assembly passed Resolution 1514, which purportedly grants the "right" of self-determination to all peoples, as long as the national unity and territorial integrity of all other nations are maintained.³⁸ In addition, General Assembly Resolutions 2200 and 2625

respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.* The United Nations Charter expands on this principle in article 55:

With 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 principles of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id. art. 55.

35. *Id.* art. 73.

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- (b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in their progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement

Id. The Charter expands on this notion in article 76:

The basic objectives of the trusteeship system . . . shall be . . . to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement

Id. art. 76; see also Carter, *supra* note 33, at 58.

36. POMERANCE, *supra* note 1, at 63-72.

37. G.A. Res. 637, *supra* note 2, pmbl.; see also Friedlander, *supra* note 16, at 76; Shaw, *supra* note 27, at 20-21.

38. G.A. Res. 1514, *supra* note 2; see also Friedlander, *supra* note 16, at 76-77 (stating

mandate that self-determination must be considered a legal norm.³⁹ According to one commentator, "Whether or not [self-determination] is actually an inherent right, there can be no doubt that it has become a cardinal doctrine of the United Nations dating from the very beginning of the world organization."⁴⁰

Nonetheless, some commentators argue that self-determination embodies a moral right, applied politically over the years with no legal validity.⁴¹ Comment c to section 103(2) of the Restatement (Third) of the Foreign Relations Law of the United States supports the assertion that the United Nations is not a law-making body: "International organizations generally have no authority to make law, and their determinations of law ordinarily have no special weight, but their declaratory pronouncements provide some evidence of what the states voting for it regard the law to be."⁴² Yet, even these commentators agree that statements by the United Nations General Assembly are relevant in determining whether self-determination is a legal right, especially if the statements are adopted by consensus.⁴³ This position

that Resolution 1514, together with Resolution 1510, effectively implies an "international guarantee of popular sovereignty"); Valentine, *supra* note 25, at 805-06 (stating that Resolution 1514 reflects widespread acknowledgement that the principle of self-determination is a right); Shaw, *supra* note 27, at 21; Johnston, *supra* note 4, at 3-4.

39. G.A. Res. 2200, *supra* note 2; G.A. Res. 2625, *supra* note 2. "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res. 2200, *supra* note 2, art. 1, ¶ 1. Resolution 2625 essentially repeats and expands upon the principle of self-determination. It states that "every state has a duty to respect this right in accordance with the provisions of the Charter." G.A. Res. 2625, *supra* note 2. See also Friedlander, *supra* note 16, at 78-79; Shaw, *supra* note 27, at 21; Johnston, *supra* note 4, at 5; POMERANCE, *supra* note 1, at 63-72.

40. Friedlander, *supra* note 16, at 75.

41. See, e.g., Halberstam, *supra* note 1, at 468; Friedlander, *supra* note 16, at 74 (stating that the purported right has been criticized for being largely political, somewhat moral, and without legal validity); Emerson, *supra* note 3, at 461 ("On the contrary, the practice of decolonization is a perfect illustration of a usage dictated by political expediency or necessity or sheer convenience. And moreover, it is neither constant nor uniform.") (quoting Leo Gross, *The Right of Self-Determination in International Law*, in *NEW STATES IN THE MODERN WORLD* (Martin Kilson ed. 1975)).

42. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) cmt. c (1987); see also Halberstam, *supra* note 1, at 469 n.18; POMERANCE, *supra* note 1, at 64.

43. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) cmt. c (1987); Halberstam, *supra* note 1, at 64 ("Resolutions of universal international organizations, if not controversial and if adopted by consensus or virtual unanimity, are given substantial weight."); Emerson, *supra* note 3, at 460 ("What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general *opinio juris*, have created the norm in ques-

is referred to as the "Higgins-Restatement position."⁴⁴

Application of the Higgins-Restatement position supports the notion that self-determination has been generally accepted and thus has evolved into a legal right.⁴⁵ Although General Assembly Resolution 637 passed by only a two to one margin,⁴⁶ General Assembly Resolutions 1514 and 1654, which essentially repeat and expand the principle of self-determination established in the United Nations Charter,⁴⁷ passed by overwhelming majorities.⁴⁸ In addition, General Assembly Resolution 2200 passed unanimously with 104 votes.⁴⁹

International Court of Justice decisions also indicate that self-determination is a legal right. For example, in 1971, the International Court of Justice, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276* ("Namibia"), held that Namibia had a right to self-determination.⁵⁰ Further, in 1975, the International Court of Justice

tion.' " (quoting Rosalyn Higgins, *The United Nations and Lawmaking: The Political Organs*, 64 AM. J. INT'L L. 43 (1970)).

44. The Higgins-Restatement position is derived from the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2) cmt. c (1987), and Higgins, *supra* note 43.

45. See *Namibia*, 1971 I.C.J. 16, 75 (June 21) (separate opinion of Vice-President Ammoun); see also Emerson, *supra* note 3, at 460 (restating Higgins' conclusion that self-determination is a legal right, based on the application of her own test).

46. 4 U.N. RESOLUTIONS SERIES I 56-58 (Dusan J. Djonovich ed., 1973).

47. All of these resolutions repeat and expand upon the earlier formulations of self-determination. Resolution 637 recalls United Nations Charter articles 1 and 55. G.A. Res. 637, *supra* note 2. Resolution 1514 recalls ideas similar to those expounded in the United Nations Charter and in Resolution 637. G.A. Res. 1514, *supra* note 2. Resolution 1654 recalls ideas founded in the United Nations Charter and Resolutions 637 and 1514. G.A. Res. 1654, *supra* note 2. See also U.N. CHARTER arts. 1, ¶ 2, 55; 4 U.N. RESOLUTIONS SERIES I, *supra* note 45, at 113 (discussing Resolution 637); 8 U.N. RESOLUTIONS SERIES I, *supra* note 45, at 188, 292 (discussing Resolutions 1514 and 1654, respectively); *Namibia*, 1971 I.C.J. at 73-75 (separate opinion of Vice-President Ammoun).

48. Resolution 1514 passed by a vote of 89 to 0, with 9 abstentions, on December 14, 1960. Johnston, *supra* note 4, at 3. Resolution 1654 passed by a vote of 97 to 0, with 4 abstentions. 8 U.N. RESOLUTIONS SERIES I, *supra* note 46, at 90.

49. 11 U.N. RESOLUTIONS SERIES I, *supra* note 46, at 49; see also *Namibia*, 1971 I.C.J. at 74 (separate opinion of Vice-President Ammoun). International Court of Justice Vice-President Ammoun wrote:

[T]he case of the right of peoples to self-determination [has] become so widespread as to be not merely "general" but universal, since it has been enshrined in the Charter of the United Nations and confirmed by . . . pacts, declarations and resolutions, which, taken as a whole, epitomize the unanimity of States in favour of the imperative right of peoples to self-determination. There is not one State, it should be emphasized, which has not, at least once, appended its signature to one or another of these texts, or which has not supported it by its vote.

Id. at 75 (separate opinion of Vice-President Ammoun).

50. *Namibia*, 1971 I.C.J. at 56-58; see also Friedlander, *supra* note 16, at 78 (stating that

held, in *Western Sahara*, that the indigenous population of the Western Sahara also had a right to self-determination.⁵¹ Thus, ample authority, including the plain meaning of United Nations resolutions, overwhelming international support for these resolutions, and International Court of Justice opinions, supports self-determination as a legal right.

Even if self-determination is not a universal legal right, one cannot deny the implications of its successful application to many Third World countries.⁵² International Court of Justice Vice-President Ammoun acknowledged the importance of prior application:

The confirmed rightness of this practice [of self-determination] is moreover evinced by the great number of States—no less than 55—which, since the consecration by the Charter of the right of self-determination, have benefited from it, after having ensured, by the struggles and strivings of their peoples, its definitive embodiment in both the theory and the practice of the new law.⁵³

C. Defining the "Self"

After defining the right of self-determination and establishing its legal nature, it is necessary to identify who may exercise the right. No generally accepted universal norms exist for determining whether a group constitutes a "people" for the purposes of the "self" in self-determination. Although United Nations proclamations discuss the principle of self-determination, the General Assembly has failed to define the concept of "self."⁵⁴ In addition, even though the Interna-

the court found (1) South Africa's presence in Namibia illegal; (2) the injured entity a "people"; and (3) the people entitled to self-determination).

51. *Western Sahara*, 1975 I.C.J. 12 (Oct. 16).

52. POMERANCE, *supra* note 1, at 63 ("Certain resolutions were adopted by consensus or near unanimity, others in the face of numerous negative votes and abstentions, especially by the West. In the view of the Third World all of these resolutions . . . create binding obligations for States.").

53. *Namibia*, 1971 I.C.J. at 75 (separate opinion of Vice-President Ammoun).

54. The United Nations Charter merely declares self-determination as a principle in international law. See U.N. CHARTER arts. 1, ¶ 2, 55. Further, United Nations resolutions state only that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res. 1514, *supra* note 2; G.A. Res. 2200, *supra* note 2, art. 1, ¶ 1; G.A. Res. 2625, *supra* note 2; see also Johnston, *supra* note 4, at 24 (stating that the United Nations left "peoples" undefined); Rachel San Kronowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 597 (1987) (stating that "[n]o definitive formulation of the term 'people' exists in international law"); Pomerance, *supra* note 32, at 311 (noting that the doctrine of self-determination is ab-

tional Court of Justice, in *Western Sahara*⁵⁵ and *Namibia*,⁵⁶ held that indigenous people have a legal right of self-determination, the opinions fail to define "people."⁵⁷ Nevertheless, United Nations proclamations and International Court of Justice opinions allow an inference supporting the majority of commentators' notions regarding the definition of "people."

Some commentators claim that the concept of "self" is incapable of definition due to its inconsistent application.⁵⁸ Others contend that "self" applies only to colonial peoples because of its context in United Nations resolutions and its post-World War II application to primarily colonial peoples.⁵⁹ Most commentators, however, propose varying criteria to determine whether a group desiring self-determination qualifies as a "people." For example, some commentators focus on the factors enunciated by the International Commission of Jurists.⁶⁰ The International Commission of Jurists lists seven factors for determining a "people." None is absolutely essential, and the "absence of any one of them should not prejudice the accessibility of the right of self-determination."⁶¹ These factors are: "(1) common history, (2) racial or ethnic ties, (3) cultural or linguistic ties, (4) religious or ideological ties, (5) common territory or geographical location, (6) common economic base, and (7) sufficient number of people."⁶²

surd because " 'the people cannot decide until somebody decides who are the people.' " (quoting SIR IVOR JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55-56 (1956)).

55. 1975 I.C.J. 12, 68 (Oct. 16).

56. 1975 I.C.J. 16, 70 (June 21) (separate opinion of Vice-President Ammoun) (stating that the majority, in referring to the appropriate United Nations resolutions, implicitly recognized the right of self-determination for the Namibian people).

57. *Western Sahara*, 1975 I.C.J. at 68; *Namibia*, 1971 I.C.J. at 70; see also Friedlander, *supra* note 16, at 78.

58. See, e.g., Pomerance, *supra* note 32, at 312 (noting United States Secretary of State Robert Lansing's concern when President Wilson first enunciated the self-determination doctrine, and claiming that the concept of self-determination is "space-bound, group-bound, and time-bound"); Kronowitz et al., *supra* note 54, at 597.

59. See G.A. Res. 1514, *supra* note 2; G.A. Res. 2200, *supra* note 2; G.A. Res. 2625, *supra* note 2; Emerson, *supra* note 3, at 463 (stating that "inhabitants, however haphazardly assembled by the colonial Power, take over pre-existing political units as independent states" with the limitations of territorial integrity and national unity imposed by Resolution 1514); Pomerance, *supra* note 1, at 18 (stating that the United Nations has opted for territorial, rather than objective, criteria); see also Johnston, *supra* note 4, at 24 (discussing the United Nations' practices after World War II).

60. The International Commission of Jurists is a non-governmental organization with consultative status in the United Nations. Johnston, *supra* note 4, at 26.

61. *Id.* (citing INTERNATIONAL COMMISSION OF JURISTS, *East Pakistan Study*, in 8 INT'L COMM'N JURISTS REV. 23, 47 (1972)).

62. *Id.*; see also Kronowitz et al., *supra* note 54, at 598.

Like the International Commission of Jurists' proposal, many commentators argue that economic and political ties within a group of people are as important as ethnic, social, religious, cultural, geographical, and linguistic ties.⁶³ General Assembly Resolutions 1514, 2200, and 2625 also suggest that economic and political unity among a people are significant.⁶⁴ In addition, the International Court of Justice majority in *Western Sahara* implied that the social, political, and economic characteristics of early nomadic tribes of the Western Sahara provided significant support for its holding that the indigenous population is entitled to self-determination.⁶⁵ Furthermore, some commentators propose tests containing factors similar to those set forth by the International Commission of Jurists.⁶⁶

Other commentators subscribe to a narrower "colonial" notion of self-determination, like that implied in the United Nations resolutions. This colonial notion defines a "people" as a group of individuals with distinct racial, religious, cultural, ethnic, or geographical ties.⁶⁷ United Nations resolutions proclaim that "by virtue of [self-

63. For purposes of this Comment, the expanded definition of "people" refers to a test similar to the International Commission of Jurists' proposal, and includes economic, political, religious, social, ethnic, geographic, and linguistic ties within a group. In contrast, a narrower "colonial" definition includes social, cultural, religious, linguistic, geographic, and ethnic ties, but excludes economic and political ties within a group.

64. G.A. Res. 1514, *supra* note 2 ("All peoples have the right to self-determination; by virtue of that right they freely determine their *political* status and freely pursue their *economic*, social and cultural development." (emphasis added)). This same passage is found in Resolutions 2200 and 2625. See G.A. Res. 2200, *supra* note 2; G.A. Res. 2625, *supra* note 2.

65. See *Western Sahara*, 1975 I.C.J. at 43.

66. See, e.g., Friedlander, *supra* note 16, at 83.

[C]onstitutional boundaries, geographic boundaries, historical relation, economic viability and sociological and psychological factors. Have the people historically constituted a nation? Do they share a common ethnic, religious or linguistic identity? Are the old and new entities economically viable? Do the people live within a common geographic area? Do they share common institutions and political authority or common awareness as a people?

Id. (alteration in original) (quoting Thomas A. Mensch, Self-Determination Under United Nations Auspices 282-329 (1963) (unpublished Ph.D dissertation, Yale Law School)). Friedlander points out, however, that there is no precise formula for determining how many characteristics are necessary for a group to constitute a "people." *Id.*

Oxford University Professor Tony Honoré offers a similar test. He states that some of the discussed criteria are necessary for a group to constitute a people with a right of self-determination. In addition, Professor Honoré's test requires that the group "consciously" possess a degree of distinction from its rulers or neighbors, in terms of language, culture, religion, ethnicity, history, topography, and social mores. Further, the group must have geographical coherence, a sufficiently numerous population, economic viability, and the capacity to assume responsibilities as a member of the international community. Tony Honoré, *The Right to Rebel*, 8 OXFORD J. LEGAL STUD. 34, 44-45 (1988).

67. See, e.g., Halberstam, *supra* note 1, at 485 (requiring a distinct racial, religious, or

determination, all peoples may] . . . freely determine their political status and freely pursue their economic, *social* and *cultural* development."⁶⁸ Even commentators who assert that self-determination applies only to colonial people admit that ethnic, religious, social, and cultural criteria are significant factors.⁶⁹ In addition, General Assembly Resolution 1514 supports the "Belgian Thesis," which advocates the extension of the colonial theory to "territories with well-defined limits, inhabited by homogenous people differing from the rest of the population in race, language, and culture, who take no part in the national life of the dominating country or group, and who are governed by their own law."⁷⁰

Because the principle of self-determination is continually evolving, any potential definition of the "self" is in a state of flux. For example, whereas the term "self-determination" was applicable to ethnic nationalities after World War I, it became synonymous with decolonization after World War II. Noted commentator Rupert Emerson writes that "all commentators on self-determination have pointed out that neither 'people' nor 'nation' has any generally accepted meaning which can be applied to the diverse world of political and social reality."⁷¹ Another commentator, Rachel San Kronowitz, points out that "[t]he far-reaching political implications of the concept of a people, then, complicate any effort to formulate a generally accepted and universally applicable definition [of the 'self' in self-determination]."⁷² An overly broad definition of "self" could cause

ethnic group); Valentine, *supra* note 25, at 816-18 (stating that linguistic, cultural, religious, and ethnic homogeneity evinces "group cohesion," as long as there is an identifiable land base and viable territorial foundations); Berman, *supra* note 33, at 91 (stating that group characteristics may include common territory, ethnicity, language, or culture); Kronowitz et al., *supra* note 54, at 597 (stating that "people" is "'a group of persons living in a given country or locality, having a race, religion, language and traditions of their own'" (quoting The Greco-Roman "Communities," Collection of Advisory Opinions (Greece v. Bulg.), 1930 P.C.I.J. (ser. B) No. 17, at 21 (July 31))); Honoré, *supra* note 66, at 44-45 (stating that a group is noted for "separateness from its rulers or neighbors," with respect to language, culture, religion, ethnicity, history, topography, and social mores).

68. G.A. Res. 1514, *supra* note 2 (emphasis added); G.A. Res. 2200, *supra* note 2; G.A. Res. 2625, *supra* note 2.

69. See, e.g., POMERANCE, *supra* note 1, at 19.

70. Johnston, *supra* note 4, at 24-25; see also G.A. Res. 1514, *supra* note 2; POMERANCE, *supra* note 1, at 15, 82 n.72.

71. Emerson, *supra* note 3, at 462; see also POMERANCE, *supra* note 1, at 23 ("Except for the most obvious cases of 'decolonization,' objective criteria have not been developed or applied for preferring one claim over another or for delimiting which population belongs to which territory.").

72. Kronowitz et al., *supra* note 54, at 597.

many nations to fear the right of self-determination, while an overly narrow definition could deny many legitimate groups the right to determine their own destiny. Emerson illustrates the problem when he writes, "It has so far proved impossible to determine what category of peoples, if any, will next be entitled to call upon the right of self-determination."⁷³ Thus, despite the inherent difficulties, it is essential in our post-colonial phase to establish a test to determine what constitutes a "people."

D. Under What Circumstances May the "Self" Determine?

1. Primary Factors

A "people" includes groups that are culturally, religiously, linguistically, socially, or ethnically similar. In addition, a "people" includes those who are politically, economically, or geographically united. After determining that a group is within the definition of "people," one must decide when this "people" is entitled to claim the right of self-determination. The concept of self-determination has been applied inconsistently throughout the twentieth century. However, United Nations proclamations, International Court of Justice decisions, and related essays attempt to explain when a "people" is entitled to claim the right of self-determination. These texts purport that the right becomes legally cognizable when the group is under the dominion of an alien force, recognizes its separateness as a "people," and expresses its desire to remain separate and independent from the alien force.

The first prerequisite to the right to self-determination is the subjugation of the "people" to a foreign influence. General Assembly Resolution 1514 declares, "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."⁷⁴ The United Nations recognizes self-determination as one of the vehicles for achieving international peace and security.⁷⁵ Hence, alien

73. Emerson, *supra* note 3, at 465. Commentator Michla Pomerance has even suggested that intra-Third World colonial relationships may exist. See POMERANCE, *supra* note 1, at 16. The Iraqi invasion of Kuwait is an example of such intra-Third World colonialism. See *infra* notes 164-79 and accompanying text for a brief overview of the invasion. This new type of colonialism makes it incumbent upon the United Nations and the International Court of Justice to establish new definitions of "people" for self-determination purposes.

74. G.A. Res. 1514, *supra* note 2.

75. See U.N. CHARTER arts. 1, ¶ 2, 55 ("With a view to the creation of conditions of

domination, which is contrary to international peace, is a prerequisite for a "people" to claim the right of self-determination.⁷⁶

Foreign domination can manifest itself in a variety of forms, including colonialism or imperialism. These forms give rise to a claim of self-determination, subject to certain limitations. General Assembly Resolution 1514 recognizes these forms of foreign domination, as it calls for "bringing a speedy and unconditional end [to] colonialism in all its forms and manifestations."⁷⁷ Following World War II, the United Nations granted the right of self-determination to most Third World colonized nations.⁷⁸ In addition, the International Court of Justice has repeatedly recognized this right. For example, in *Namibia*, International Court of Justice Vice-President Ammoun stated that the one situation giving rise to the application of the right of self-determination is a people's legitimate struggle for liberation from foreign domination.⁷⁹ Commentators note that colonialism has generally yielded to the right of self-determination of indigenous societies.⁸⁰

In addition to colonialism and imperialism, United Nations resolutions suggest that other forms of domination grant "people" the right of self-determination. These resolutions call for an end to "*colonialism in all its forms and manifestations.*"⁸¹ In fact, General Assembly Resolution 2625 asserts that:

[it is] the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state Every State has the duty to refrain in its international relations from the threat or use of force against the territo-

stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote"); see also G.A. Res. 2625, *supra* note 2, pmb1.

76. See, e.g., Emerson, *supra* note 3, at 463 (pointing out that domination is one of the consistent themes that emerges from an analysis of self-determination after World War I and World War II); POMERANCE, *supra* note 1, at 14; Honoré, *supra* note 66, at 45 (stating that tyranny, aggression, domination, and exploitation trigger the right to rebel).

77. G.A. Res. 1514, *supra* note 2.

78. See Emerson, *supra* note 3, at 463-64; see also Valentine, *supra* note 25, at 804.

79. *Namibia*, 1971 I.C.J. 16, 74 (June 21) (separate opinion of Vice-President Ammoun) ("I refer in particular to the fight of peoples for freedom and independence, which has been going on ever since there have been conquering and dominating peoples and subject but unjugated peoples.").

80. See, e.g., POMERANCE, *supra* note 1, at 14-23; see also Pomerance, *supra* note 32, at 320.

81. G.A. Res. 1514, *supra* note 2 (emphasis added).

rial integrity or political independence of any State Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.⁸²

General Assembly Resolution 2625 explicitly states that all forms of coercion over an entity's political, economic, social, or cultural systems, or over its territory, are impermissible. Such coercion gives rise to a people's right of self-determination.⁸³

Although coercion is an important element of a valid claim of self-determination, a group claiming this right must also be aware⁸⁴ that it is a "people."⁸⁵ Additionally, the "people" must express a desire to be self-governing:⁸⁶ "History suggests that those who maintain and assert their self-government, their freedom from outside domination, and their own economic, social and cultural development are most likely to eventually gain international recognition as peoples who have the right to self-determination, regardless of formal rules."⁸⁷

There are two widely recognized methods for a "people" to express its desire to be separate from the dominating state. First, it can

82. G.A. Res. 2625, *supra* note 2.

83. See, e.g., *Namibia*, 1971 I.C.J. at 56-57. In discussing how apartheid in Namibia placed limitations, exclusions, and restrictions on the indigenous population over its economic, political, and social life, the International Court of Justice found that Namibia had a right of self-determination. *Id.*; see also Carter, *supra* note 33, at 61 (stating that one factor giving rise to a claim of self-determination is the deprivation of a group's ability to govern itself); Valentine, *supra* note 25, at 816 (pointing out that interference with free choice, political status, and discriminatory social legislation gives a group the right to secede from the state); Pomerance, *supra* note 32, at 320 (suggesting that self-determination inures to four groups: dependent peoples; peoples subjected to alien subjugation, domination, and exploitation; peoples under colonial or alien domination; and peoples under racist regimes and alien occupation).

84. Friedlander, *supra* note 16, at 83; see also Honoré, *supra* note 66, at 44-45 (stating that a group must consciously possess a sense of separateness as a people); Valentine, *supra* note 25, at 817 (stating that a "people" must have an "associated desire"); Carter, *supra* note 33, at 61 (discussing self-consciousness as a prerequisite for self-determination).

85. Under the "colonial" definition, a "people" includes a group that is socially, religiously, culturally, linguistically, geographically, or ethnically similar. Under a more expansive test, a "people" also includes a group with economic or political ties.

86. Carter, *supra* note 33, at 64, 87 (stating a third prerequisite of a manifested desire to be self-governed and evidence of legal and political institutions); Valentine, *supra* note 25, at 817 (suggesting that an articulation of the desire to be self-governing is necessary for a claim of secession); Berman, *supra* note 33, at 70, 92 (stating that there must be an expression of a desire, by political or military means, to change political status).

87. Kronowitz et al., *supra* note 54, at 600 (citing INDIAN LAW RESOURCE CENTER, HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES 15 (1984)).

hold a national referendum.⁸⁸ Second, and more persuasively, the group can engage in an armed conflict justifiable as self-defense.⁸⁹ Such violence implies that the group aspires to freedom.⁹⁰ According to International Court of Justice Vice-President Ammoun:

If there is any "general practice" which might be held, beyond dispute, to constitute law within the meaning of Article 38, paragraph 1(b), of the Statute of the Court, it must surely be that which is made up of the conscious action of the peoples themselves, engaged in a determined struggle. This struggle continues for the purpose of asserting, yet once more, the right of self-determination.⁹¹

Thus, if a group (1) qualifies as a "people"; (2) is dominated by an alien influence in any way; (3) consciously recognizes its ethos; and (4) demonstrates its desire to be separate, the right of self-determination inures to that group.

2. Limitations

A "people's" right to invoke self-determination is limited.⁹² First, a "people" may exercise the right of self-determination only once. According to former Secretary General of the United Nations, U Thant:

So far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.⁹³

88. G.A. Res. 637, *supra* note 2, pt. A, ¶ 2 ("[T]he wishes of the people [are] ascertained through plebiscites or other recognized democratic means, preferably under the auspices of the United Nations.").

89. *See, e.g., Namibia*, 1971 I.C.J. at 69-70, 74 (separate opinion of Vice-President Ammoun).

90. *Id.* ("The struggle of the Namibian people thus takes its place within the framework of international law, not the least because the struggle of peoples in general has been one, if not indeed the primary factor, in formation of the customary rule whereby the right of peoples to self-determination is recognized."); *see also* Valentine, *supra* note 25, at 819-20 (stating that violence indicates a group's will and desire to be free); Berman, *supra* note 33, at 92 (suggesting that a desire to be free may be expressed politically, by vote, or militarily, by armed resistance).

91. *Namibia*, 1971 I.C.J. at 74 (separate opinion of Vice-President Ammoun).

92. As the next section of this Comment explains, these limitations affect the particular form in which self-determination will manifest itself. *See infra* notes 127-33 and accompanying text.

93. Emerson, *supra* note 3, at 464 (quoting former Secretary General U Thant *in* U.N. GAOR, 25th Sess., Supp. No. 18, at 69, U.N. Doc. A/8018 (1970)).

Therefore, when a group becomes a separate entity, its disaffected minorities are entitled to no further right of secession.

Some commentators allude to an exception to this "one time only" limitation. This exception applies when the foreign entity amasses a long and infamous record of human rights violations against the claimant group.⁹⁴ It is based upon General Assembly Resolution 2200, which suggests that a severe violation of human rights by any member state of the United Nations against a minority group within that state may give rise to a right of self-determination in favor of that minority group.⁹⁵

A second limitation on the exercise of the right of self-determination is geographical integrity for both the nation claiming the right and the dominating nation losing control of that territory in the process.⁹⁶ General Assembly Resolutions 1514 and 2625 suggest that the right of self-determination should not be construed to permit "the partial or total disruption of the national unity and the territorial integrity" of a dominating country.⁹⁷ The nation accused of alien domination has a right of territorial integrity and national unity. This right apparently preempts the right of self-determination.⁹⁸ The International Court of Justice has presided over many cases in which nations asserted that claimants' desires for self-determination challenged their territorial integrity. For example, Morocco argued this

94. Friedlander, *supra* note 16, at 80; *see also* Emerson, *supra* note 3, at 463-64.

95. *See* G.A. Res. 2200, *supra* note 2, art. 5, ¶ 1. Resolution 2200 states, "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein . . ." *Id.* Further, Resolution 2200 states that, "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." *Id.* art. 27. Since this resolution mentions an expanded legal right of self-determination and discusses international human rights, it follows that disaffected minority groups whose members are the object of extreme discrimination that cannot be alleviated through an appropriate remedy should be entitled to invoke the right of self-determination.

96. Emerson, *supra* note 3, at 462, 463; *see also* Valentine, *supra* note 25, at 818; Berman, *supra* note 33, at 52, 70; Kronowitz et al., *supra* note 54, at 803-04; Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PENN. L. REV. 1127, 1129 (1961). Geographic integrity connotes a definitive boundary for the "people" invoking the right of self-determination.

97. G.A. Res. 1514, *supra* note 2; G.A. Res. 2625, *supra* note 2, pmb.

98. *See, e.g.*, Emerson, *supra* note 3, at 463; Valentine, *supra* note 25, at 818 (stating that the geographic viability of the two areas is an important factor); Kronowitz et al., *supra* note 54, at 593; POMERANCE, *supra* note 1, at 43; Pomerance, *supra* note 32, at 320; Friedlander, *supra* note 16, at 76-77; S.K.N. Blay, *Self-Determination Versus Territorial Integrity in Decolonization*, 18 N.Y.U. J. INT'L L. & POL'Y 441, 443-49 (1986).

point, albeit unsuccessfully, in *Western Sahara*.⁹⁹ Commentator S.K.N. Blay states that the International Court of Justice balances the claimant group's interests in self-determination against the interests of the dominating nation in its territorial integrity.¹⁰⁰

In addition to being preempted by a dominating nation's right to territorial integrity, a claimant group must possess a distinct geographical territory,¹⁰¹ and be geographically and economically viable as a separate entity.¹⁰² However, one commentator suggests that the lack of viability will not, in and of itself, defeat a claim for self-determination.¹⁰³ This commentator argues that, because of the interdependence of the international community, it is inconsequential that a nation is landlocked or unable to provide for its own subsistence without foreign trade.¹⁰⁴

To assert a successful claim for self-determination, a claimant group must also be politically viable, both internally and externally: "[C]laims of [a] legal right by non-state groups and their members, 'being internationally unrecognized . . . must be clothed in the garb of state rights before they can be put forward internationally.'" ¹⁰⁵ To qualify as a state, a group must have a permanent population, a defined territory, an effective government, and a capacity to conduct foreign affairs.¹⁰⁶ In other words, a claimant group must have a sufficiently large and effectively organized population located in a defined area to demonstrate its ability to meet its obligations in the na-

99. 1975 I.C.J. 12, 68 (Oct. 16). In *Western Sahara*, the International Court of Justice held that Morocco's ties to Western Sahara were not significant enough to deprive the Western Saharans of the right of self-determination, but the court also noted that Morocco's ties had a direct bearing on the application of Resolution 1514 to the case. *Id.*

100. Blay, *supra* note 98, at 449-50 (citing J. Robert Maguire, *The Decolonization of Belize: Self-Determination v. Territorial Integrity*, 22 VA. J. INT'L L. 849, 872 (1982)). Blay further argues that in decolonization, self-determination overrides the principle of territorial integrity and national unity. *Id.* at 450.

101. Valentine, *supra* note 25, at 818; *see also* Emerson, *supra* note 3, at 462 ("Peoples or territories to which [self-determination] applies" must be "demarcated with at least reasonable clarity."); Berman, *supra* note 33, at 52, 70; Honoré, *supra* note 66, at 44-45 (discussing geographic coherence); Friedlander, *supra* note 16, at 83 (stating that a claimant group must possess a common geographical area); Cohen, *supra* note 96, at 1129 (stating that a defined territory is necessary, although it has not been strictly enforced).

102. *See* Valentine, *supra* note 25, at 818; *see also* Honoré, *supra* note 66, at 44-45; Friedlander, *supra* note 16, at 83.

103. *See* Valentine, *supra* note 25, at 819.

104. *See id.*

105. Berman, *supra* note 33, at 52 (quoting WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 53 (A. Pearce Higgins ed., 8th ed. 1924)).

106. *Id.*; *see also* Cohen, *supra* note 96, at 1129.

tional and international communities.¹⁰⁷ Emerson points out that these obligations may be "too onerous" on micro-states,¹⁰⁸ and that the current "low point" of member state populations in the United Nations is the Maldiv Islands with 100,000 people.¹⁰⁹

Finally, a claimant group's assertion of the right to self-determination may fail if the exercise of this right would produce any negative effect in the international community.¹¹⁰ In particular, a claimant group may be denied the right of self-determination if the international community believes (1) it will be disruptive; (2) the group claims an area that is a strategic point that should be tightly controlled; or (3) the group claims an area that has natural resources that are vital to the world community.¹¹¹

In summary, a "people" is entitled to self-determination if (1) it is controlled in any way by a foreign country; (2) it is conscious of itself as a "people"; and (3) it articulates its desire for self-determination. The limitations on this right of self-determination affect the particular form in which the right manifests itself.¹¹² The most important limitations on this right are that (1) the two groups must be geographically, economically, and politically viable as separate entities; (2) the claimant group must have a sufficient number of people to conduct foreign affairs; and (3) the group must not create problems for the international community by its independence from the alien or dominating nation. The most credible claim for independence results from the presence of as many of these factors as possible.

E. The Forms of Self-Determination and the Factors Relevant in the Selection of the Appropriate Form for a Particular Group

1. The Various Forms of Self-Determination

Once it is established that a group constitutes a "people" and circumstances exist giving rise to a claim for self-determination, the

107. Emerson, *supra* note 3, at 471; see also Honoré, *supra* note 66, at 44-45; Cohen, *supra* note 96, at 1129.

108. A micro-state is a state with an extremely small population. See Emerson, *supra* note 3, at 471-72.

109. *Id.* at 469.

110. Honoré, *supra* note 66, at 45.

111. Berman, *supra* note 33, at 70 (citing Clyde Eagleton, *The Excesses of Self-Determination*, 31 FOREIGN AFF. 592, 601 (1953)).

112. See *infra* notes 127-33 and accompanying text.

group and the international community must decide upon the form of the group's self-determination. The United Nations permits four types of self-government: "(1) the establishment of a sovereign and independent State, (2) the free association [with an independent State] . . . , (3) [the] integration with an independent State . . . , [and] (4) the emergence into any other political status freely determined by a people."¹¹³ One commentator argues that these forms work well with colonial regimes, yet, in non-colonial disputes, other methods are more suitable.¹¹⁴

Although independence is the most common and most understood method of implementing self-determination, less obvious forms exist. Free association allows a claimant group to exercise sovereignty over its own internal affairs, while the state with which the claimant group associates retains power over national concerns, such as defense.¹¹⁵ General Assembly Resolution 1541 defines free association:

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of the territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.¹¹⁶

Another form of self-determination is integration with an independent state. Integration provides assurance from the state with which a claimant integrates that it will exercise no form of discrimination.¹¹⁷ Unlike free association, integration does not permit a claim-

113. G.A. Res. 2625, *supra* note 2; see also *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter: Annex*, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 2a, U.N. Doc. A/4651 (1960); *Western Sahara*, 1975 I.C.J. 12, 32-33 (Oct. 16); Emerson, *supra* note 3, at 470-71; Carter, *supra* note 33, at 73; POMERANCE, *supra* note 1, at 24.

114. Carter, *supra* note 33, at 73.

115. *Id.* at 76.

116. G.A. Res. 1541, *supra* note 113, princ. VII.

117. Carter, *supra* note 33, at 76.

ant group to modify its status at any time.¹¹⁸ Some argue, however, that self-determination is a continuing right that can be modified until a people has achieved independence.¹¹⁹ Regardless of this tangentially related issue, the United Nations defines integration as follows:

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage¹²⁰

Other processes reflecting the free will of a people include local autonomy and merger,¹²¹ which are similar to integration, association, and independence. Although self-determination assumes many forms, specific forms apply to particular cases.

2. The Factors Relevant in Selecting the Appropriate Form for a Specific Claimant Group

According to United Nations documents and various international law opinions, the expression of the free and independent will of a people satisfies the requirements for self-determination, regardless of form.¹²² The United Nations Charter asserts that a goal of the Trusteeship System is to "promote the political, economic, social, and edu-

118. POMERANCE, *supra* note 1, at 25 (recalling General Assembly Resolution 1541).

119. *Id.*; see also EMERSON, *supra* note 3, at 470.

120. G.A. Res. 1541, *supra* note 113, *princs.* VIII, IX.

121. CARTER, *supra* note 33, at 74.

122. See HALBERSTAM, *supra* note 1, at 470; see also CARTER, *supra* note 33, at 78 (stating that political and economic readiness are considerations only for the form of self-determination);

cational advancement of the inhabitants of the trust territories, and their progressive development toward self-government or independence *as may be appropriate to the particular circumstances of each territory and its peoples.*"¹²³ General Assembly Resolution 1514 states that the "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."¹²⁴ In *Western Sahara*, the International Court of Justice stated that its decision should aid the United Nations General Assembly in determining the best mode of implementing the right of self-determination for the Western Saharan people.¹²⁵ Judge Dillard wrote in his concurrence, "[I]t may be suggested that self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it."¹²⁶

Commentators argue that the form of self-determination is contingent upon the limitations mentioned in the preceding section. Once a group demonstrates that it is a "people," and that it has been subjected to foreign domination, has an ethos of itself, and has expressed its desire for independence, the group can claim the right of self-determination. The limitations—geographical integrity of the two areas, economic viability, sufficiency in number of people, and effects on the international community—determine the particular form of self-determination.¹²⁷

One commentator suggests that economic and territorial viability provide a right to secession.¹²⁸ This implies that viability is a factor for determining whether a claimant group has a right to become a sovereign and independent state. If neither landlocked territory nor economic inviability automatically defeat a secessionist claim,¹²⁹ such a group may still be entitled to self-determination, although not in the form of independence.

Similarly, commentator Michael Carter lists a group of factors that determine the appropriate form of self-determination. These factors include (1) the interests of the groups of the existing state;

POMERANCE, *supra* note 1, at 24-25 ("The essence of self-determination is method, not result.").

123. U.N. CHARTER art. 76 (emphasis added).

124. G.A. Res. 1514, *supra* note 2.

125. *Western Sahara*, 1975 I.C.J. at 36-37.

126. *Id.* at 123 (separate opinion of Judge Dillard).

127. See Halberstam, *supra* note 1, at 471; see also Emerson, *supra* note 3, at 469-70; Carter, *supra* note 33, at 77; Valentine, *supra* note 25, at 818-19.

128. See Valentine, *supra* note 25, at 818.

129. *Id.* at 819.

(2) economic viability; (3) geographic position; (4) strategic considerations; (5) political consequences; and (6) diversity or similarity among the peoples.¹³⁰ He argues that political and economic readiness are merely considerations relating to the form of self-government, and thus do not deny self-determination to colonial peoples.¹³¹ Emerson argues that other forms of self-determination for micro-states, beyond independence, are more desirable because of the limited ability of micro-states to assume the obligations imposed upon states by the international community.¹³² Commentator Malvina Halberstam concludes, "[T]he desirability of an independent state depends on its economic, political, and military viability and on the effect its independence would have on other states in the region."¹³³

Thus, self-determination can manifest itself in a variety of forms. The most desirable form for a particular group is determined with reference to (1) the geographic, economic, and political viability of the two groups; (2) the claimant group's population and capacity to conduct its foreign affairs; (3) the "one time only" limitation; and (4) the effects on the international community.

III. A CONTEMPORARY EXAMPLE: KUWAIT'S RIGHT TO SELF-DETERMINATION

A. Overview

This section applies the complex principle of self-determination to the Iraq-Kuwait conflict by weighing the merits of the competing arguments. Opinions differ as to how the war between the United States and Iraq began. The United States argued that its purpose in the Persian Gulf was to curb aggression.¹³⁴ Iraq countered that the countries of the imperialist West originally divided the Arab nation into many states to obtain a constant source of petroleum for their economies. Accordingly, Iraq claimed that Kuwait was always an integral part of Iraq. At the heart of both arguments is the issue of Kuwait's right to self-determination.

Although Great Britain may have illegally separated Kuwait

130. Carter, *supra* note 33, at 77.

131. *Id.* at 78.

132. Emerson, *supra* note 3, at 469-71.

133. Halberstam, *supra* note 1, at 471.

134. R.W. Apple, Jr., *Invading Iraqis Seize Kuwait and Its Oil*, N.Y. TIMES, Aug. 3, 1990, at A1 (nat'l ed.). Indeed, a dangerous precedent would have been set had the world passively watched the expansionist-minded leader attack his diminutive neighbor and annex its territory.

from Iraq,¹³⁵ Kuwait is nevertheless entitled to invoke its right of self-determination. Kuwait's claim for independence is substantiated by Iraq's long-time failure to exercise dominion over the Kuwaiti people and territory, and by the evolution of a Kuwaiti culture.

B. The Gulf Conflict

1. Historical Background

The Persian Gulf region has historically been considered an area of strategic and commercial importance.¹³⁶ During the period of Persian and Ottoman dominion in the Gulf, the bay that adjoined the

135. Dennis Hevesi, *Iraq's Strike on Kuwait: At Roots, Tribal Rivalry*, N.Y. TIMES, Aug. 5, 1990, at A1 (nat'l ed.).

136. HER MAJESTY'S STATIONERY OFFICE, ROYAL SCOT. MUSEUM, EDINBURGH, THE EVOLVING CULTURE OF KUWAIT 16-29 (1985) [hereinafter THE EVOLVING CULTURE OF KUWAIT]. Early Asia, from its trading expeditions, was well-acquainted with the Persian Gulf. *Id.* at 16. In addition, a Greek trading colony, dating between the third and first centuries B.C., occupied Turkey, Syria, and Iran down to the Gulf. *Id.* A temple to the goddess Artemis, a major fortification, and well-planned homes and workshops have been excavated in the area near Kuwait. *Id.* Archaeologists argue that the trading community of Gerrha, located on the mainland opposite Bahrain and inhabited by Arabs, existed simultaneously with the Greek trading colony. *Id.*

Traditionally, Arabia developed as an area conducive to two ways of life. Settled communities inhabited the more fertile coastal regions, and nomadic tribes wandered the deserts with their flocks. *Id.* at 15. These two types of people were never completely isolated, however, because the nomads traveled to the cities to trade for products they could not produce, such as clothes and metalware, while the settlers purchased the meat and dairy products the nomads produced. *Id.* By the fifth century A.D., Mecca was the most significant and commercially thriving city in the world. *Id.*

Religion also played a significant role in Mecca's ascent to prominence. Mohammed founded the religion of Islam between the sixth and seventh centuries A.D. In A.D. 622 Mohammed emigrated to Medina, where Islam was transformed from a religion into a politically organized religious community. *Id.* Mohammed and his supporters engaged in military expeditions eventually leading to the capture of Mecca in A.D. 630. *Id.* During the final two years of his life, when Mohammed ruled as the head of state, many Arab tribes converted to Islam and recognized the authority of Mohammed. *Id.*

From A.D. 632 to 661, many transformations occurred in the Islamic community. Although the Arab tribes were no longer unified after Mohammed's death, Islam continued to expand. Various tribes dominated much of the Middle East by conquering Syria, Egypt, Iraq, and Persia. *Id.* at 16. The establishment of capitals in Damascus and Baghdad increased the demand for luxury goods. *Id.* at 17. Silks and porcelains from China, slaves and ivory from Africa, and spices, gems, and fabrics from India were exchanged for pearls, rugs, cotton cloth, and metalware from the Persian Gulf area. *Id.*

Although the forces of trade and religion took root in the Middle East, the Arabs were unaccustomed to the boundary demarcations by which Europeans lived. *Id.* at 28, 29. Middle Eastern tribes continued to live together in moderate equilibrium until the fifteenth century, when the influence of outside powers transformed the Arab nations and upset the balance of power in the region. The Persians and Ottomans existed side-by-side as dominating foreign influences over the Arabs. *Id.* at 17. Despite engaging in trade with Northern Gulf Arabs, the

east of Kuwait enabled the Kuwaiti culture to thrive as a small community.¹³⁷ Modest records from the seventeenth and eighteenth centuries substantiate the existence of a long-established tradition of tribes that migrated from the desert to the towns and coastal regions of the Gulf, in search of a better way of life.¹³⁸

Migrating constantly between Basra and Qatar, the Bani Khalid tribe settled in Kuwait in the late seventeenth century.¹³⁹ In 1670, the tribe successfully contested Ottoman control by besieging the Ottoman governor and forcing his retreat.¹⁴⁰ Similarly, the Bani Utub tribe migrated to Kuwait because of a drought.¹⁴¹ The Sabah family,

Persians eventually became involved in hostilities sparked by the European presence in territories near present-day Iran. *Id.*

The Ottoman Turks' influence in the region can be traced to their military conquests. *Id.* They captured Syria and Egypt by A.D. 1517, and Baghdad by 1534. *Id.* By 1555, they controlled Saudi Arabia, Qatar, and Basra. *Id.* at 18. As was their custom, the Ottomans divided their area of rule into administrative units staffed with Turkish bureaucrats. *Id.* The areas were actually controlled by the heads of Arab tribes, who depended on the Turks for defense and cooperation in transporting goods. *Id.* Therefore, the Ottomans and the various Arab tribes remained on relatively good terms at the beginning because their relationship was mutually reliant. In return for Ottoman aid in military and commercial areas, various Arab tribes recognized the authority of the Ottoman empire.

The European powers' entry into the Persian Gulf territory caused major changes in the Gulf's political and economic affairs. The Portuguese, Dutch, and British used the Gulf as a "stage in the extension of their trading routes with India." *Id.* The Portuguese wanted to control the Gulf because it was an ideal storage place for goods in transport, a valuable trading post, and a strategically important area, as it aided them in intercepting their commercial rivals' ships. *Id.* The Persians, encouraged by the British, objected to the Portuguese presence in the area. *Id.* By 1651, the Portuguese were expelled from Bahrain, Hormuz, and Oman. *Id.* Consequently, by the 1700s, the Portuguese were relegated to the role of a trading and shipping power. *Id.* The British similarly encouraged the Persians to expel the Dutch, who had established several bases in the Gulf by 1602. *Id.* at 18-19.

The English East India Company established a base in the Gulf in 1600. *Id.* at 19. The company established a factory in Persia by 1617, and by 1645, it had factories in Basra, which was under Ottoman administration. *Id.* With the expulsion of their European trading rivals, the British consolidated their economic and political power over the region. The British placed a consulate in Basra in 1764, and by 1783, Ottoman and Persian influences in the region began to fade. *Id.* The Persians experienced a civil war in 1779 as a result of their king's death. *Id.* Although the Utub tribe of Arabs took control of Bahrain from the Ottomans in 1783, the Ottomans were not completely defeated until the end of World War I. *Id.* at 25.

137. *Id.* at 19.

138. *Id.* at 19, 21; see also GEORGE LENCZOWSKI, *THE MIDDLE EAST IN WORLD AFFAIRS* 654 (4th ed. 1980); R.V. Pillai & Mahendra Kumar, *The Political and Legal Status of Kuwait*, 11 INT'L & COMP. L.Q. 108 (1962); Hevesi, *supra* note 135; *THE MIDDLE EAST: A POLITICAL AND ECONOMIC SURVEY* 165 (Peter Mansfield ed., 5th ed. 1980).

139. *THE EVOLVING CULTURE OF KUWAIT*, *supra* note 136, at 19-20.

140. *Id.* at 20. Thereafter, they consolidated their territory. *Id.*

141. *Id.* at 21.

leader of the Bani Utub, has ruled Kuwait since 1756.¹⁴² As trade prospered, many more tribes followed these early tribes and settled around Kuwait Bay.

From the middle of the eighteenth century until the end of World War I, the tribes in Kuwait were forced to make overtures to the Ottomans and the English.¹⁴³ Various tribes, living under the loose dominion of the Ottoman Empire, constantly attacked Kuwait's Bani Khalid tribe.¹⁴⁴ Despite its initial decline, the Ottoman Empire increased its influence with military successes against the Bani Khalid and the Wahhibis.¹⁴⁵ Although Kuwait was officially a part of the Ottoman Empire, Turkish control from 1756 until the 1890s was nominal.¹⁴⁶ The Ottoman Empire classified Kuwait as a district in the province of Basra. Until 1898, descendants of the Sabah family were conferred with an Ottoman title, and Kuwait regularly paid tribute to the Ottomans.¹⁴⁷

Mubarek ben Sabah ruled as Sheikh of Kuwait from 1896 until 1915.¹⁴⁸ Sheikh Mubarek's main goal was to strengthen and fortify Kuwait against Turkish control.¹⁴⁹ At the same time, trade competition pressured Great Britain to establish a permanent commercial base in the Gulf because the Germans and Russians were gaining access to different areas in the region.¹⁵⁰ Thus, in 1899, Kuwait and Great Britain signed a secret treaty ("1899 Secret Treaty") in which Great Britain agreed to maintain and protect Kuwait's autonomy,

142. LENCZOWSKI, *supra* note 138, at 660; *see also* Pillai & Kumar, *supra* note 138, at 109; Hevesi, *supra* note 135; Mohdaltatz Ghoneimy, *The Legal Status of the Saudi-Kuwait Neutral Zone*, 15 INT'L & COMP. L.Q. 690 (1966); THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 21.

143. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 21.

144. *Id.*

145. *Id.* at 23.

146. LENCZOWSKI, *supra* note 138, at 660; *see also* HUSSEIN A. HASSOUNA, THE LEAGUE OF ARAB STATES AND REGIONAL DISPUTES 131 n.1 (1975) ("Kuwait was neither an integral part of nor totally independent from the Ottoman Empire."); HUSSEIN M. ALBAHARNA, THE ARABIAN GULF STATES 253 (2d ed. 1975); Pillai & Kumar, *supra* note 138, at 109, 118.

147. LENCZOWSKI, *supra* note 138, at 660; *see also* HASSOUNA, *supra* note 146, at 131 n.1; ALBAHARNA, *supra* note 146, at 41; Pillai & Kumar, *supra* note 138, at 109, 117.

148. LENCZOWSKI, *supra* note 138, at 660; *see also* Pillai & Kumar, *supra* note 138, at 110; Ghoneimy, *supra* note 142, at 690; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 24.

149. LENCZOWSKI, *supra* note 138, at 660.

150. ALBAHARNA, *supra* note 146, at 42; *see also* Pillai & Kumar, *supra* note 138, at 110-11; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 24-25.

and Kuwait agreed to uphold Great Britain's monopoly in Kuwait.¹⁵¹ In 1899, Sheikh Mubarek signaled Kuwait's autonomy from the Turks by imposing a five percent tax on all commercial goods passing through Kuwait, including Turkish goods.¹⁵² On September 9, 1901, the Ottoman Empire and Great Britain entered into a treaty whereby the Ottomans agreed to respect the status quo in Kuwait, and Great Britain agreed not to establish a protectorate in Kuwait.¹⁵³ Although it was never ratified due to the outbreak of World War I, a 1913 treaty between Turkey and Great Britain recognized Kuwait's autonomy.¹⁵⁴

After World War I, the Allies restructured the Ottoman Empire into different Arab countries. Iraq became a British mandate in 1920, and was admitted into the League of Nations in 1932.¹⁵⁵ A treaty signed in 1922 at the Conference of Uqair set forth the boundaries of Kuwait, Iraq, and Saudi Arabia.¹⁵⁶ In addition, the Treaty of Sèvres and the Treaty of Lausanne confined the Ottomans to the area of modern-day Turkey, and represented the Ottomans' official relinquishment of all rights in the Gulf area.¹⁵⁷ Kuwait existed effectively as a protectorate of Great Britain for the next forty years.

During Kuwait's protectorate period, Iraqi nationalists repeatedly claimed sovereignty over Kuwait.¹⁵⁸ As a result of the 1899 Secret Treaty, Great Britain consistently defended Kuwait from these attacks.¹⁵⁹ In June 1961, Kuwait and Great Britain terminated the 1899 Secret Treaty, thus establishing Kuwait's sovereignty and inde-

151. LENCZOWSKI, *supra* note 138, at 661; *see also* ALBAHARNA, *supra* note 146, at 42-43; Pillai & Kumar, *supra* note 138, at 110; Ghoneimy, *supra* note 142, at 690; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 25; HASSOUNA, *supra* note 146, at 91.

152. ALBAHARNA, *supra* note 146, at 253; Pillai & Kumar, *supra* note 138, at 110.

153. ALBAHARNA, *supra* note 146, at 43-44; *see also* Pillai & Kumar, *supra* note 138, at 111.

154. Although this treaty was never ratified, it marked Turkey's first official renunciation of full sovereignty over Kuwait and its first official recognition of Great Britain's special status in the region. LENCZOWSKI, *supra* note 138, at 661; *see also* HASSOUNA, *supra* note 146, at 91; ALBAHARNA, *supra* note 146, at 45; Pillai & Kumar, *supra* note 138, at 111, 119 n.69 (arguing for the validity of the agreement), 121-22 (pointing out the ambiguity of the document).

155. ALBAHARNA, *supra* note 146, at 254; *see also* IRAQ: A COUNTRY STUDY 33-40 (Richard F. Nyrop ed., 1979).

156. LENCZOWSKI, *supra* note 138, at 662; *see also* ALBAHARNA, *supra* note 146, at 45; Pillai & Kumar, *supra* note 138, at 113. The Kuwait-Iraq border was again agreed upon in 1932. *Id.*

157. Pillai & Kumar, *supra* note 138, at 113; *see also* ALBAHARNA, *supra* note 146, at 255.

158. HASSOUNA, *supra* note 146, at 91, 131-32 n.6; *see also* Pillai & Kumar, *supra* note 138, at 114.

159. HASSOUNA, *supra* note 146, at 92, 94; *see also* Pillai & Kumar, *supra* note 138, at 121-24; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 26.

pendence.¹⁶⁰ One month later, Iraq again claimed sovereignty over Kuwait, prompting England to send troops to reinforce Kuwait's borders.¹⁶¹ Although this attack was effectively repelled, Iraq threatened Kuwait three more times between 1961 and 1989¹⁶² even though tensions eased between the two nations following an overthrow of the aggressive Iraqi government.¹⁶³ On August 2, 1990, Iraq again invaded Kuwait, seized control of its capital city and rich oil fields, and drove Kuwait's ruler into exile,¹⁶⁴ claiming that Kuwait was, and always had been, a vital part of Iraq.¹⁶⁵

2. Iraq's Occupation of Kuwait

Initial world response to the August 1990 Iraqi invasion of Kuwait was swift. United States President George Bush condemned the attack as an act of "naked aggression."¹⁶⁶ In addition, the United Nations Security Council issued a unanimous call for Iraq's withdrawal from Kuwait, despite Iraq's claim that splinter groups in Kuwait requested assistance from the Iraqi military.¹⁶⁷ Further, the United States and the Soviet Union issued a joint statement through their foreign ministers, condemning the invasion.¹⁶⁸

Unswayed by world opinion, Iraq continued its occupation of Kuwait. As a result, the United Nations Security Council voted to

160. HASSOUNA, *supra* note 146, at 92-93.

161. *Id.*; see also *Questions Relating to the Middle East*, 1961 U.N.Y.B. 146-49, U.N. Sales No. 62.I.1.

162. Iraq laid claims to Kuwait in 1968, 1973, and 1974-76. LENCZOWSKI, *supra* note 138, at 667.

163. ALBAHARNA, *supra* note 146, at 251; see also HASSOUNA, *supra* note 146, at 106-07; LENCZOWSKI, *supra* note 138, at 667.

164. Apple, *supra* note 134.

165. See Mark Fineman, *Iraq Remaps Kuwait as Province 19*, L.A. TIMES, Aug. 29, 1990, at A14; see also John Kifner, *Iraq Proclaims Kuwait's Annexation*, N.Y. TIMES, Aug. 9, 1990, at A1 (nat'l ed.).

166. See Apple, *supra* note 134. Bush imposed economic sanctions barring all trade with Iraq, and froze all Kuwaiti and Iraqi assets in the United States. *Id.* The European Community and Japan followed the United States' lead by freezing assets and halting all trade with Iraq. Clyde Haberman, *Trade Sanctions Against Baghdad Imposed by European Community*, N.Y. TIMES, Aug. 5, 1990, at A1 (nat'l ed.); Steve Lohr, *Experts Say Embargo May Work if Nations Maintain Commitment*, N.Y. TIMES, Aug. 6, 1990, at A1 (nat'l ed.); Alan Riding, *West Europeans Join U.S. in Condemning Invasion*, N.Y. TIMES, Aug. 3, 1990, at A6.

167. See Apple, *supra* note 134; see also Paul Lewis, *UN Condemns the Invasion with Threat to Punish Iraq*, N.Y. TIMES, Aug. 3, 1990, at A6 (nat'l ed.).

168. R.W. Apple, Jr., *Iraqis Mass on Saudi Frontier*, N.Y. TIMES, Aug. 4, 1990, at A1 (nat'l ed.). The Arab League denounced the Iraqi government by a 14 to 0 vote with 7 abstentions. *Id.* In addition, the Soviet Union, China, and France suspended arms sales to Iraq. *Id.*

block trade with Iraq.¹⁶⁹ Despite growing pressure, Iraq annexed Kuwait as its nineteenth province¹⁷⁰ and seized Western hostages.¹⁷¹ The United Nations quickly declared the Iraqi annexation "null and void" by a unanimous vote of the Security Council.¹⁷²

As opposition continued to mount against Saddam Hussein, Iraq agreed to meet with the United Nations.¹⁷³ Iraq offered to withdraw from Kuwait if the Israeli-Palestinian issue¹⁷⁴ were included in an overall Middle East peace settlement.¹⁷⁵ The United States declared this linkage unacceptable.¹⁷⁶

Iraq subsequently deployed troops into Kuwait and encouraged Kuwaitis to leave.¹⁷⁷ Rumors spread that Iraq would attempt to hold a vote to show that the Kuwaitis wanted to be a part of Iraq.¹⁷⁸ Iraq believed it could secure its success through a Kuwaiti national referendum. Iraq contended that because Kuwait had been illegally separated from Iraq after World War I, it was still part of Iraq. However,

169. Paul Lewis, *Security Council Votes 13 to 0 to Block Trade with Baghdad*, N.Y. TIMES, Aug. 7, 1990, at A1 (nat'l ed.). To enforce a blockade, the United States, France, and Britain sent ships to the Persian Gulf. The United States immediately sent its naval task force to the Gulf. Apple, *supra* note 134. France and Britain followed the United States' lead less than one week later. Andrew Rosenthal, *Bush Sends US Force to Saudi Arabia as Kingdom Agrees to Confront Iraq*, N.Y. TIMES, Aug. 8, 1990, at A1 (nat'l ed.). Meanwhile, Turkey agreed to participate in the economic sanctions and shut off a major pipeline to Iraqi oil. Clyde Haberman, *Quick Action by Turkey on Sanctions a Startler*, N.Y. TIMES, Aug. 8, 1990, at A8 (nat'l ed.). Finally, the United States, along with Morocco, Egypt, Syria, and Pakistan, sent ground troops to secure the Saudi border. R.W. Apple, Jr., *Arab Troops Join Saudi Force*, N.Y. TIMES, Aug. 12, 1990, at A1 (nat'l ed.); Barbara Crossette, *Pakistanis Agree to Join Defense of Saudi Arabia*, N.Y. TIMES, Aug. 14, 1990, at A19 (nat'l ed.). Iraqi President Saddam Hussein later threatened to strike Israel and the Saudi oil fields if the blockade was not lifted. Nick Williams, Jr., *Iraq Threatens to Avenge Blockade*, N.Y. TIMES, Sept. 24, 1990, at A1 (nat'l ed.).

170. See Fineman, *supra* note 165.

171. Williams, *supra* note 169.

172. Paul Lewis, *UN Council Declares Void Iraqi Annexation of Kuwait*, N.Y. TIMES, Aug. 10, 1990, at A9 (nat'l ed.).

173. Gerald F. Seib & Walter Mossberg, *US Appears Likelier to Use Force in Gulf*, WALL ST. J., Oct. 1, 1990, at A3.

174. The Israeli-Palestinian issue is beyond the scope of this Comment. For a survey of the issues involved in the Israeli-Palestinian conflict, see Halberstam, *supra* note 1; MYTHS AND FACTS 1976: A CONCISE RECORD OF THE ARAB-ISRAELI CONFLICT (1976); Berliner, *supra* note 1.

175. Seib & Mossberg, *supra* note 173.

176. *Id.* French President François Mitterand modified Iraq's proposal, and suggested that Iraq withdraw from Kuwait in exchange for an international effort to end other Middle East disputes and end sanctions against Iraq. *Id.* The United States agreed with part of the French proposal, but found other parts unacceptable. *Id.*

177. Karen Tumulty & David Lauter, *Iraqi Brutality, Exodus Altering Face of Kuwait*, L.A. TIMES, Sept. 20, 1990, at A1.

178. *Id.*

the world community would not have viewed such a referendum as valid because the United Nations had already declared the annexation void.¹⁷⁹

C. *Legal Right Binding Iraq*

Based on its state practices and participation in various pacts and resolutions, Iraq cannot rightfully deny the legality of self-determination. Iraq became an independent nation after World War I as a result of the principle of self-determination.¹⁸⁰ Additionally, as a member of the United Nations, Iraq is a party to the United Nations Charter, which recognizes the principle of self-determination.¹⁸¹ Furthermore, Iraq voted affirmatively on General Assembly Resolutions 637, 1514, 2200, and 2625.¹⁸² These actions demonstrate Iraq's acknowledgment of self-determination as a legal right.

D. *Kuwait as a "People"*

Kuwait may be classified as a "people" under both the restricted "colonial" definition of the term and the factor-specific tests that consider economic and political unity. A strong case can be made that Kuwait's status was so like that of a colonized nation that it was granted its independence by Great Britain after 1961 pursuant to General Assembly Resolution 1514.

Foreigners were lured to Kuwait because of its strategic and commercial importance.¹⁸³ Great Britain, as the preeminent power in Kuwait, exploited the area for its strategic location and, later, its oil.¹⁸⁴ The 1899 Secret Treaty represented Great Britain's initial rec-

179. See *supra* note 172 and accompanying text. After a four-month military build-up in the Persian Gulf, the United States-led coalition defeated the Iraqi army in less than one hundred hours of armed conflict. Robert E. Hunter, *Let Iraq off the Hook*, N.Y. TIMES, Mar. 2, 1991, at A23.

180. See *supra* notes 52-53, 155-56 and accompanying text.

181. See U.N. CHARTER arts. 1, ¶ 2, 55.

182. See G.A. Res. 637, *supra* note 2; G.A. Res. 1514, *supra* note 2; G.A. Res. 2200, *supra* note 2; G.A. Res. 2625, *supra* note 2; POMERANCE, *supra* note 1, at 63; see also *supra* notes 52-53 and accompanying text.

183. LENCZOWSKI, *supra* note 138, at 654 ("The Persian Gulf became the object of attention among early maritime powers."); see also Pillai & Kumar, *supra* note 138, at 109; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 16, 18-19.

184. In exchange for protecting Kuwait from foreign powers, Great Britain established a virtual monopoly over Kuwaiti land and economic resources. LENCZOWSKI, *supra* note 138, at 661; see also Pillai & Kumar, *supra* note 138, at 110, 118-19; Ahmad Hijazi, *Kuwait: Development from a Semitribal, Semicolonial Society to Democracy and Sovereignty*, 13 AM. J. COMP. L. 428 (1964); THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 25.

ognition of protectorate status for Kuwait. Furthermore, Great Britain officially conducted Kuwaiti foreign affairs from the close of the World War I until the 1950s. Great Britain has come to the defense of Kuwait on numerous occasions. For example, in 1904, Great Britain's intervention in the Gulf caused Germany to abandon its plan to capture Kuwait.¹⁸⁵ This intervention also prevented the Ottomans from forcibly re-establishing imperial authority over Kuwait.¹⁸⁶ In 1913, Great Britain negotiated a treaty with the Ottomans guaranteeing Kuwait's autonomy from the Turks.¹⁸⁷ Moreover, Great Britain negotiated the current Kuwaiti boundaries with the Saudis and Iraqis in 1922 and 1932.¹⁸⁸

Great Britain's participation in the World War I peace talks ensured Kuwaiti independence.¹⁸⁹ However, since Kuwait was not yet ready for independence in the 1920s, Great Britain created a protectorate. In recognition of its obligations under the United Nations Charter, Great Britain prepared Kuwait for independence in the 1950s. In 1959, Great Britain turned over to the Kuwaiti government the postal and wireless telegraph systems it had established.¹⁹⁰ To further its obligation to bring a "speedy end to colonialization in all its forms and manifestations" under General Assembly Resolution 1514, Great Britain signed an agreement with Kuwait in 1961, terminating the 1899 Secret Treaty and delineating a close friendship between the two nations.¹⁹¹

Kuwait's status as Great Britain's protectorate represents a clear post-World War II application of the right of self-determination, a view supported by the United States and its coalition forces.¹⁹² This view relies on the premise that Kuwait was legally separated from Iraq. It assumes that Kuwait was not an integral part of Iraq because

185. Pillai & Kumar, *supra* note 138, at 111. In addition, during World War I, when Ottoman troops gathered south of present-day Turkey in preparation of an attack on Kuwait, Great Britain sent troops to bolster the Kuwaiti borders. *Id.* Again, in 1961, after granting Kuwait its independence, Great Britain rescued Kuwait from Iraqi invasion. *Id.* at 115-16; *see also Questions Relating to the Middle East, supra* note 161, at 146-49; HASSOUNA, *supra* note 146, at 93-94; ALBAHARNA, *supra* note 146, at 250-51.

186. Pillai & Kumar, *supra* note 138, at 111.

187. *See supra* note 154 and accompanying text.

188. Pillai & Kumar, *supra* note 138, at 113.

189. *See supra* note 157 and accompanying text.

190. ALBAHARNA, *supra* note 146, at 44.

191. *Id.* at 40. Kuwait and Great Britain promised to consult with each other on matters of mutual importance, and Great Britain promised to assist Kuwait upon request. *Id.*; *see also* Pillai & Kumar, *supra* note 138, at 115.

192. *See* Apple, *supra* note 134; Lewis, *supra* note 169.

United Nations Resolution 1514 forbids the use of self-determination in situations that would disrupt the territorial integrity or national unity of any other state.¹⁹³ Since Great Britain apparently granted Kuwait its independence pursuant to this resolution, the world community's view is that Kuwait was not an integral part of Iraq. For the purposes of this Comment, this "colonial" definition of people is insufficient, because this Comment maintains that Kuwait was separated from Iraq illegally.

Nevertheless, Kuwait constitutes a "people" under the standards set forth by a number of commentators.¹⁹⁴ Since the 1700s, Kuwait has possessed some of the characteristics necessary to classify itself as a "people." Over time, it has become even more cohesive as a "people." Thus, when Iraq invaded Kuwait on August 2, 1990, Kuwait was a "people."

Before the Europeans emerged in the Gulf, the Kuwaitis were historically, politically, and geographically unified, even though socially, culturally, and religiously similar to other Arabs. Like most Arabs in the region, Kuwaiti tribes followed the Islamic faith.¹⁹⁵ Similarly, Kuwaiti tribes were culturally unified, but not distinct from the other Arab tribes in the region.¹⁹⁶ Nevertheless, the Kuwaitis possessed one common socio-cultural heritage distinct from other Arab peoples: they traveled to Kuwait as a result of a long drought, in search of a better way of life.¹⁹⁷

Not only do Kuwaitis have a socio-cultural history that differs from the rest of the Arab world, they are also geographically united and distinct. The permanent fresh water supply and harbor are unique to the region, and explain the migration of various tribes to Kuwait.¹⁹⁸ Moreover, the geography of Kuwait created a unique

193. See G.A. Res. 1514, *supra* note 2.

194. A "people" includes groups that are culturally, religiously, linguistically, socially, or ethnically similar. A "people" also includes those who are politically, economically, or geographically united. See *supra* notes 54-73 and accompanying text.

195. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 15.

196. Although the Kuwaitis had a common social life conducive to nomadic and settling ways, they were similar to the rest of the Arab world. *Id.*

197. *Id.* at 19.

It is not until the late 17th and early 18th centuries that admittedly modest records concerning Kuwait came to light from which it is clear that the long established tradition of tribal migration from Najd to both the towns and shores of the Arabian Gulf in search of better opportunities persisted.

Id.

198. *Id.* at 11.

Until the discovery of oil reserves in the 1930s and their subsequent exploitation after

economy. Nomads who settled in Kuwait adapted to become sailors, boat builders, pearl fishermen, and traders.¹⁹⁹ Between 1761 and 1764, Dane Neibuhr, an early British traveler to the region, described Kuwait as follows:

Koueit or *Graen*, as it is called by the Persians and Europeans, is a sea-port town, three days journey from *Zobejer* or old Basra. The inhabitants live by the fishery of pearls and fishes. They are said to employ in this series of naval industry more than eight hundred boats. In the favorable season of the year, this town is left almost desolate, every body going out either to the fishing, or upon some trading adventure. Graen is governed by a particular Schiech, of the tribe of *Othema* [Utub], who is a vassal to the Schiech of Lachsa [Ottoman], but sometimes aspires at independence. In such cases, when the Schiech of Lachsa advances with his army, the citizens of Graen retreat with their effects onto the little island of *Feludsje*.²⁰⁰

As Neibuhr points out, Kuwait was under the Ottoman Empire's tutelage. Although Kuwait had some socio-cultural, economic, and geographical unity and distinctness, it did not, by the mid-eighteenth century, possess the ability to express its desire for independence.

Yet, as time passed, Kuwait became increasingly distinct as a "people." In the mid-eighteenth century, Kuwait unified politically under a monarchical government.²⁰¹ It was governed without direct Turkish interference by a single dynasty since 1756, and maintained its sovereignty in 1871 when the Kuwaiti tribes suppressed an invasion by a nearby Ottoman governor.²⁰² Kuwait was not found on Turkish Empire maps, and the Turks merely exercised a loose system of tutelage over Kuwait from 1850 until 1910.²⁰³ The Kuwaiti rulers accepted title from the Ottomans, but such title did not affect Kuwait as a separate entity.²⁰⁴ Kuwait's payment of tribute was more sym-

World War II, Kuwait's most valuable natural resource was its bay, one of the only two good harbours along the Arabian Gulf, the other being Bahrain As the area around Kuwait bay had a fresh water source . . . , it was natural that a permanent settled population should concentrate here.

Id.

199. LENCZOWSKI, *supra* note 138, at 660; *see also* THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 20-22.

200. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 20 (citing DANE NIEBUHR, 2 TRAVELS IN ARABIA AND OTHER COUNTRIES IN THE EAST 127-28 (1792)).

201. *Id.*

202. *Id.*

203. *Id.* at 252-53 n.5.

204. *Id.*

bolic than significant because Kuwait continued to maintain its own economic, political, cultural, and social affairs as an autonomous entity, even while the Ottomans "controlled" Kuwait. One commentator writes:

Kuwait's progress in the 19th century indicates how effective her rulers of the 18th century had been for despite increasing problems with the Wahhabis of Najd and threats from Gulf pirates, she managed to maintain her independence, by adroitly keeping on good terms with opposing factions, and steadily to pursue her mercantile interest.²⁰⁵

Kuwait became increasingly unified, both politically and ideologically. Due to its unique topography and location, it also enjoyed a distinctive economy. James Silk Buckingham described Kuwait in 1816, when he visited the Gulf:

[Kuwait] is a port of some importance, seated in a fine bay; and the town is large and populous, though the sandy desert presses close upon its walls, and no vegetation is to be seen around it, within the range of human view. It seems always to have preserved its independence too, even at the time when Ormuz, Muscat, Bahrein, Lahsa, and even Kateef and Bussorah, which two last were garrisoned by Turks, were assailed by the Portuguese arms, and they still bear the reputation of being the freest and bravest people throughout the Gulf The town itself is chiefly inhabited by mercantile and trading people, who engage in all branches of commerce carried on throughout the Gulf. The port sends out, at least, a hundred sail of vessels . . . ; and the people who navigate them, as well as those for whom they sail, have the highest character for probity, skill, firmness, and courage.²⁰⁶

Buckingham's account highlights Kuwait's political unity against foreign invasion. He describes Kuwait's unique geography and economy, which, unlike many of its Arab neighbors, had few agricultural products. Trading and fishing around the bay were abundant well into the 1800s. Furthermore, Buckingham's portrayal of the Kuwaitis as brave and skillful in boating suggests that other groups in the region respected them. More importantly, however, it suggests

205. *Id.* at 22.

206. *Id.* (citing JAMES SILK BUCKINGHAM, 2 TRAVELS IN ASSYRIA, MEDIA AND PERSIA, INCLUDING A JOURNEY FROM BAGHDAD BY MOUNT ZAGROS TO HAMADAN, THE ANCIENT ECBATANA, RESEARCHES IN ISAPAHAN AND THE RUINS OF PERSEPOLIS AND JOURNEY FROM THENCE BY SHIRAZ AND SHAPOOR TO THE SEA-SHORE, DESCRIPTION OF BUSSORAH, BUSHIRE, BAHRAIN, ORMUZ AND MUSCOT 314-17 (1816)).

that other groups were beginning to recognize Kuwait's separateness as a "people."

By the late 1800s, Kuwait was a distinct society, unified by geography, political ideology, common cultural history, and economy. Arguably, however, Kuwait was not extremely different from other Arabs linguistically, socially, religiously, ethnically, or racially. Yet, the differences among the Western Europeans, Americans, and Canadians are also slight with respect to these traits. Not every characteristic of a "people" is necessary for a group to be considered a "self" for self-determination purposes.²⁰⁷ Moreover, Kuwait's economic, political, and social transformation in the twentieth century made Kuwait even more unique as a nation in the Gulf region. Thus, even if Kuwait was not a "people" by the early 1900s, it had definitely emerged into a "people" by 1990.²⁰⁸

E. Specific Circumstances Enabling Kuwait to Claim the Right of Self-Determination

There were two periods in Kuwait's history when circumstances encouraged it to seek self-determination. The first period occurred before World War I; the second after August 2, 1990. Before World War I, Kuwait was under the Ottoman Empire's subjugation. The Ottomans controlled the entire Arab world through their vast military conquests.²⁰⁹ The Ottomans reasserted authority over their holdings militarily at several different times during their 400 years of domination.²¹⁰ They were an overwhelming imperial power, even though they ruled their territories loosely. In addition, the Ottomans demanded that all Arab tribes pay tribute to them.²¹¹ Since military aggression against a "people" is a form of subjugation, and since forced payments are also a form of domination, the first requirement of self-determination was met.

In addition to foreign domination, Kuwait was also conscious of itself as a "people" distinct from its subjugators. Sheikh Mubarek's overtures to Great Britain in 1897 and 1898 to prevent Turkey from annexing Kuwait²¹² represent his desire to secede from the Ottomans. Sheikh Mubarek's five percent duty on all goods transported through

207. See, e.g., *supra* note 61 and accompanying text.

208. See *supra* notes 54-73, 194 and accompanying text.

209. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 17.

210. *Id.* at 17-18, 23.

211. See *supra* note 147 and accompanying text.

212. ALBAHARNA, *supra* note 146, at 41; see also Pillai & Kumar, *supra* note 138, at 110;

Kuwait, including Ottoman goods,²¹³ suggests that Kuwait considered itself autonomous. Finally, during World War I, a Kuwaiti vessel jettisoned the Ottoman flag and flew Kuwait's flag in its place.²¹⁴ Symbolically, this suggests a Kuwaiti ethos and awareness of itself as a separate "people."

As well as possessing an ethos and being subject to alien domination, Kuwait expressed its desire for independence by seeking Great Britain's assistance in 1897 and 1898.²¹⁵ Buckingham's account suggests that Kuwait also preserved its independence by resorting to force.²¹⁶ Kuwait's execution of the 1899 Secret Treaty with Great Britain, guaranteeing Great Britain an economic monopoly in Kuwait in exchange for protection,²¹⁷ conveys that Kuwait desired independence, but lacked the power to preserve it. Additionally, the British and Ottoman agreements of 1901 and 1913 suggest that Kuwait, through its agent, Great Britain, was interested in preserving its autonomy.²¹⁸ Kuwait's pledge of allegiance to Great Britain at the outbreak of World War I was made in exchange for Great Britain's promise to preserve the Kuwaiti independence.²¹⁹

Similarly, Kuwait met the requirements for self-determination on August 2, 1990. Iraq's invasion of Kuwait constituted alien subjugation. Even before the military attack, Iraq's attempts to place production quotas on members of the Organization of Petroleum Exporting Countries ("OPEC") was a form of coercion.²²⁰ Kuwait's defiance of OPEC quotas connotes an assertion of its ethos and desire for independence. And perhaps most importantly, Kuwait's resistance of the Iraqi invasion²²¹ illustrates a sincere effort by a "people" to express its

THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 24-25; LENCZOWSKI, *supra* note 138, at 661.

213. ALBAHARNA, *supra* note 146, at 253; *see also* Pillai & Kumar, *supra* note 138, at 110.

214. Pillai & Kumar, *supra* note 138, at 112.

215. *See supra* note 212 and accompanying text.

216. *See* THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 22-23. Niebuhr's account of Kuwait also discussed Kuwait's ability to preserve its independence. *See id.* at 20.

217. *See supra* note 151 and accompanying text.

218. The 1901 agreement provided that Turkey promised to respect the status quo in Kuwait if Great Britain did not annex or establish a protectorate over Kuwait. ALBAHARNA, *supra* note 146, at 43. The 1913 agreement provided that Turkey would recognize the autonomy of Kuwait if Great Britain would again agree not to establish a protectorate over Kuwait. Pillai & Kumar, *supra* note 138, at 120-22.

219. Pillai & Kumar, *supra* note 138, at 112.

220. *See* Apple, *supra* note 134.

221. *See* Kim Murphy, *Reprisals Curtail Kuwait Resistance*, L.A. TIMES, Oct. 10, 1990, at A6.

desire to be free from alien domination.²²² Thus, Kuwait's resistance to Iraqi annexation demonstrates that Kuwait maintained its right of self-determination.

F. Kuwait's Right to be an Independent and Sovereign State

Although Kuwait did not meet the prerequisites for transforming its right of self-determination into nationhood²²³ after World War I, today it has territorial integrity, a large population, a strong economy, and a capacity to conduct foreign affairs. In addition, Kuwait's autonomy presents minimal problems for the region, and it does not interfere with Iraq's territorial integrity or political unity.

After World War I, Great Britain effectively established a protectorate over Kuwait, with the intent to prepare Kuwait for future independence. Kuwait was an impoverished Third World country after World War I, as oil was not discovered until the 1930s.²²⁴ Its population numbered only 50,000,²²⁵ making it virtually impossible for Kuwait to take on the responsibilities of nationhood. Moreover, Kuwait's continual acquiescence to Great Britain's foreign affairs policy, as well as Kuwait's relinquishment of its right to conduct foreign affairs in the 1899 Secret Treaty, suggests a lack of political independence. In addition, Kuwait's boundaries after World War I were unestablished.²²⁶ The Versailles Peace Conference created many Arab states, but not Kuwait.²²⁷ In fact, its boundaries were not officially set until 1932. Iraq's assertions between 1920 and 1940 that Kuwait was part of Iraq supports Iraq's claim of national unity disruption. The world community may also have been concerned that if Kuwait was granted nationhood, a major strategic port would have been under the control of an impoverished and powerless nation.

The progression of Kuwaiti society during the twentieth century created conditions that transformed Kuwait's desire for self-determination into a quest for nationhood. Assuming Kuwait's exercise of

222. See *supra* notes 90-92 and accompanying text.

223. The requirements of nationhood are the same as the requirements for presenting a credible claim for independence. These requirements include geographical integrity, economic viability, a sufficient population, and political viability. See Halberstam, *supra* note 1, at 471; Emerson, *supra* note 3, at 469-70; Carter, *supra* note 33, at 77; Valentine, *supra* note 25, at 818-19.

224. LENCZOWSKI, *supra* note 138, at 662, 665; see also HASSOUNA, *supra* note 146, at 92; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 83.

225. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 38.

226. See *supra* note 156 and accompanying text.

227. See *supra* notes 155-57 and accompanying text.

self-determination violated the notion that self-determination may be exercised only once,²²⁸ Iraq argued that Kuwait made a secessionist claim. This Comment accepts this premise because Iraq claimed that Kuwait had always been a vital part of Iraq.²²⁹ Therefore, the argument continues, the establishment of Iraq granted it the right of self-determination. Any claim of self-determination by a part of Iraq, such as Kuwait, violates this central United Nations Charter principle.²³⁰

Even assuming the validity of this argument, Iraq's countless human rights violations against its own people²³¹ allow the minority group to assert the right of self-determination. Some of the atrocities described to the United States Congress following the Iraqi invasion include execution, rape, torture, and looting.²³² These atrocities are not new. During its eight-year war with Iran, Iraq used poison gas on its own Kurdish population.²³³ With such a long record of continued and serious human rights violations committed against various groups under Iraqi control,²³⁴ Kuwait's right of self-determination may be exercised under General Assembly Resolution 2200.²³⁵

Kuwait represents a major exception to the "one time exercise" rule. It also possesses a distinct and definitive geographical area, as well as a sufficiently large population. If the current low point for United Nations member populations is approximately 100,000 people, Kuwait's population, which was 250,000 in 1958²³⁶ and over

228. See Friedlander, *supra* note 16, at 80; Emerson, *supra* note 3, at 463-64.

229. See *supra* note 165 and accompanying text.

230. See *supra* notes 94-95 and accompanying text.

231. Sue Ellen Christian, *Witnesses Tell of Iraq Atrocities in Kuwait*, L.A. TIMES, Oct. 11, 1990, at A6.

232. *Id.*

We took our cousin, who was in labor, to Sabah Maternity Hospital. Upon our arrival, we saw a Kuwaiti woman at the front door—in hysterics, because she was in labor and they [Iraqi troops] would not allow her to enter. When she continued to scream, they put a bayonet through her stomach, pinning her to the wall. We left the hospital immediately and delivered my cousin's baby at home.

Id. (quoting American witness Deborah Hadi).

233. See Roger Simon, *Did Non-Meeting of Minds Result in War?*, L.A. TIMES, July 21, 1991, at E2.

234. This Comment assumes that Kuwait was an integral part of Iraq. The human rights violations against the Kurds and Kuwaitis are assumed, therefore, to be committed against minority groups within Iraq.

235. G.A. Res. 2200, *supra* note 2; see *supra* note 95 and accompanying text.

236. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 38; see also LENCZOWSKI, *supra* note 138, at 663.

1,000,000 in 1978,²³⁷ meets the United Nations' requirement for affiliation. Kuwait's borders were set in practice by the 1913 Ottoman-British Treaty, and have been official since 1932.²³⁸ The 1932 Iraq-Kuwait agreement, negotiated by Great Britain, reiterated the 1913 boundary demarcations.²³⁹ In addition, the Saudi Arabian-Kuwaiti border was established, along with a neutral zone, at the Convention of Uqair in 1922.²⁴⁰

Kuwait is also a viable nation. Geographically, it suffers no access problems, as it is not landlocked.²⁴¹ Its economy has thrived since the discovery of oil.²⁴² Kuwait has a model welfare system, surpassing even that of Sweden.²⁴³ Education, healthcare, and telephone service in Kuwait are free,²⁴⁴ and study-abroad programs are subsidized by the government.²⁴⁵ Kuwait imposes no taxes, except for import duties.²⁴⁶ Employment is guaranteed, as the government promises to hire citizens if they cannot obtain private sector employment.²⁴⁷ A person cannot lose a government job unless the Crown Prince approves the termination.²⁴⁸ Finally, not only does Kuwait have a model welfare system, its economy is one of the most advanced in the world, and its per capita gross national product is one of the world's highest.²⁴⁹

Beyond its socio-economic and geographic viability as a state, Kuwait is politically viable, both internally and externally. It has demonstrated a capacity to conduct its own foreign affairs since the 1950s.²⁵⁰ In addition, Kuwait is a member of a number of interna-

237. U.S. DEP'T OF STATE, COUNTRIES OF THE WORLD 473 (1974); see also LENCZOWSKI, *supra* note 138, at 663.

238. See *supra* note 154 and accompanying text.

239. See *supra* notes 156-57 and accompanying text.

240. See *supra* note 156 and accompanying text.

241. Kuwait is a tiny nation located southeast of Iraq, north of Saudi Arabia, and west of the Persian Gulf.

242. LENCZOWSKI, *supra* note 138, at 662.

243. See RICHARD F. NYROP ET AL., AREA HANDBOOK FOR THE PERSIAN GULF STATES 59-60 (1977); see also THE ARAB WORLD 102 (Irwin Isenberg ed., 1976) (reprinting *The Oil States of the Persian Gulf*, GREAT DECISIONS 71 (1975)); THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 86; U.S. DEP'T OF STATE, *supra* note 237, at 475.

244. THE ARAB WORLD, *supra* note 243, at 102.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. THE WORLD BANK, WORLD TABLES 1991, at 1-5, 356.

250. See Pillai & Kumar, *supra* note 138, at 114.

tional organizations,²⁵¹ and has created the Fund for Arab Economic Development.²⁵²

Kuwait established itself as a constitutional monarchy in 1962.²⁵³ Its constitution provides that Kuwait is an Arab state with an hereditary ruler, or Emir, ruling under Islamic law.²⁵⁴ The Emir has the power to make legislative decisions in consultation with the Crown Prince and his Council of Ministers.²⁵⁵ The Crown Prince is the next in line to the throne, and he chooses the Cabinet of the Emir.²⁵⁶ A national legislative body is popularly elected for four-year terms.²⁵⁷ Laws are approved by the legislature and ratified by the Emir.²⁵⁸ The official state religion is Islam,²⁵⁹ and personal liberty, freedom of press, and freedom of speech are basic tenets of the constitution.²⁶⁰ Kuwait's constitution also establishes a tripartite division of power between the legislative, executive, and judicial branches of government, similar to that of the United States.²⁶¹

In the 1970s, Kuwaiti oil reserves were estimated to be the fourth largest in the world.²⁶² Yet, because Iran, Iraq, Saudi Arabia, the former Soviet Union, Venezuela, Mexico, the United States, and United Arab Emirates all produce oil, Kuwait's oil producing capabilities pose no threat to the international community. However, if Iraq were to conquer Kuwait, Iraq would effectively control one-fourth of the world's oil supply. This would pose a serious threat to interna-

251. HASSOUNA, *supra* note 146, at 92. The list includes membership in the Arab League since 1961. *Id.* at 102. Moreover, Kuwait became a member of the United Nations in 1963. *Id.* at 110. Other organizations in which Kuwait is a member include the International Telecommunications Union, the Universal Postal Union, the International Maritime Consultative Organization, the World Health Organization, the United Nations Educational, Scientific, and Cultural Organizations, and the International Labour Office. *Id.* at 132 n.8; *see also* AL-BAHARNA, *supra* note 146, at 251, 256 n.2; Pillai & Kumar, *supra* note 138, at 129; Hijazi, *supra* note 184, at 434-35; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 87.

252. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 87; *see also* U.S. DEP'T OF STATE, *supra* note 237, at 476; *Questions Relating to the Middle East*, *supra* note 161, at 147.

253. LENCZOWSKI, *supra* note 138, at 663-64; *see also* U.S. DEP'T OF STATE, *supra* note 237, at 473; Hijazi, *supra* note 184, at 436-37; THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 83-84; *see generally* Saba Habachy, *A Study in Comparative Constitutional Law: Constitutional Government in Kuwait*, 3 COLUM. J. TRANSNAT'L L. 116 (1964).

254. Habachy, *supra* note 253, at 116.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. LENCZOWSKI, *supra* note 138, at 665.

tional stability. The presence of multinational forces in Saudi Arabia resulted from this potential threat.

Iraq's economic viability, geographic cohesiveness, and political unity are not threatened by the existence of Kuwait as a separate state. Currently, Iraq controls approximately six percent of the world's oil reserves,²⁶³ and has access to the Persian Gulf through seventy-eight kilometers of coastline.²⁶⁴ Kuwait would not interfere with the majority socio-political faction in Iraq. Iraq's population is between fifty and fifty-five percent Shiite Muslim.²⁶⁵ Forty percent of its population is Sunni Muslim, half of which are non-Arab Kurds.²⁶⁶ In contrast, Kuwait is primarily a Sunni Muslim state with only a tiny fraction of Shiites.²⁶⁷

Kuwait's existence does not threaten Iraq's territorial integrity. First, Kuwait's landmass is minuscule compared to Iraq's.²⁶⁸ Second, Iraq's claims to Kuwait rest on the assumption that Iraq is the successor to the Ottoman Empire.²⁶⁹ Commentators discredit this claim.²⁷⁰ In addition, it does not follow that Kuwait is an integral part of Iraq. As the Ottoman successor, Iraq would be bound by the Treaties of Sèvres and Lausanne in which Turkey surrendered all rights to territories outside present-day Turkey.²⁷¹ Moreover, the Ottomans' grant of territory to Iraq did not include the Kuwaiti territory.²⁷²

Iraq's previous acquiescence to Kuwait's existence casts doubt on its current claim. Iraq was a party to the 1922 and 1932 agreements establishing the borders of Iraq, Saudi Arabia, and Kuwait. Therefore, by its signature, Iraq recognized Kuwait's right to certain lands. In addition, the heads of state of Iraq and Kuwait have, over the years, exchanged letters recognizing Kuwait's sovereignty.²⁷³

263. NYROP ET AL., *supra* note 243, at 274.

264. *Id.* at 68.

265. *Id.* at 4.

266. *Id.* at 4-5.

267. THE EVOLVING CULTURE OF KUWAIT, *supra* note 136, at 45.

268. Iraq occupies an area of approximately 169,235 square miles. THE EUROPA WORLD YEARBOOK 1991, at 1405 (32d ed.). Kuwait, in contrast, occupies an area of approximately 6880 square miles. *Id.* at 1623.

269. The argument that Iraq is the Ottoman successor follows from Iraq's contention that no other entity could possibly claim rights to the Kuwaiti territory.

270. See ALBAHARNA, *supra* note 146, at 252-57; see also Pillai & Kumar, *supra* note 138, at 116-30.

271. Pillai & Kumar, *supra* note 138, at 126-29; see also ALBAHARNA, *supra* note 146, at 255-56.

272. See *supra* note 157 and accompanying text.

273. ALBAHARNA, *supra* note 146, at 256.

Evidence of Iraq's tacit recognition of Kuwait as a separate entity can also be found in other intergovernmental correspondence that took place between Iraq and Kuwait concerning various commercial, economic, and security matters.²⁷⁴ There was a further exchange of letters in 1963 between the Iraqi and Kuwaiti heads of state confirming Iraq's official recognition of Kuwait's independence and the boundaries between the two nations, as established by the 1932 treaty.²⁷⁵ Kuwait and Iraq also signed a financial agreement in 1963 providing that Kuwait would lend thirty million British pounds to Iraq.²⁷⁶ By entering into these agreements, Iraq implicitly recognized the sovereignty and integrity of Kuwait.

Finally, Iraq agreed to admit Kuwait to a number of international organizations.²⁷⁷ In fact, Iraq even sponsored Kuwait's applications to join the International Telecommunications Union and the International Labour Organization.²⁷⁸ Moreover, the long intervals between 1923 and 1990 when Iraq was silent on the issue of Kuwait's sovereignty²⁷⁹ could be construed as acceptance of Kuwait's status.

IV. RESOLUTION

As the Kuwaiti example demonstrates, a claimant group constituting a "people" is entitled to invoke the right of self-determination when, against the group's will, a foreign entity claiming sovereignty over it attempts to reassert its authority over the group after a long hiatus during which the group has effectively developed into an independent state. This right inures to the group even if the group was separated illegally from the dominating foreign "sovereign." This rule is recognized when the group is a "people" that has been subjugated against its will after having essentially met the requirements for nationhood. The supposed illegal separation claim by the subjugator is defeated because the foreign sovereign has silently acquiesced in the group's independence by not asserting control in circumstances in which a motherland would be expected to intervene.

This proposed rule could be applied in all situations where one "people" uses force against another. The world community should utilize the right of self-determination in analyzing the validity of the

274. *Id.* at 256 n.2.

275. *Id.* at 252.

276. *Id.*

277. *Id.*

278. *Id.*; see also Pillai & Kumar, *supra* note 138, at 129.

279. See Pillai & Kumar, *supra* note 138, at 252.

two parties' positions. If the International Court of Justice or the United Nations finds that the dominated "people" is entitled to self-determination, the world should support that group's claim for self-determination, regardless of its form. If the international tribunal discovers otherwise, the world community should support the aggressor to the extent necessary to deny the claim for self-determination. However, the world community should not permit the killing of the members of any group. This proposed rule would provide legal validity to what nations already do—take sides in a conflict. Employing international law would resolve conflicts more decisively and with fewer casualties. In addition, the rule enables the International Court of Justice to clarify some of the confusion among various sub-issues involved in a claim for self-determination.²⁸⁰ Most importantly, it would reaffirm the principle of self-determination as a principle of democracy.²⁸¹

V. CONCLUSION

This Comment analyzes the right of self-determination, using the example of the Iraq-Kuwait conflict. Self-determination is the right of a group of people to determine its political, economic, and cultural institutions without foreign influence. Self-determination is a legal right that applies to a group of people who are culturally, religiously,

280. For example, the proposed rule would enable the international tribunal to define more clearly the concept of "self," the factors necessary for a group to present a valid claim of self-determination, and the factors involved in deciding the particular form.

281. The freedom of the former "Iron Curtain" nations in eastern Europe is another contemporary application of the principle of self-determination from the inverse point of view. Instead of assuming an illegal separation, the eastern European examples assume illegal annexations by the oppressors. These cases present claims that are at least as valid as Kuwait's. The recent independence of the Baltic republics is similarly significant. See, e.g., Jerry Gray, *Germany and Britain Split on Larger Community*, N.Y. TIMES, Sept. 26, 1991, at A17; Clifford Krauss, *Ukrainian Leader and Bush Confer*, N.Y. TIMES, Sept. 26, 1991, at A8. Furthermore, the claims of Northern Ireland, Croatia, and the Palestinians have reached the point of armed conflict. For a discussion of the Croatian conflict with Yugoslavia, see Jonathan Schell, *By-standers to War on Principle?*, NEWSDAY, Sept. 29, 1991, at 29 (Nassau and Suffolk ed.); William Drozdiak, *EC Balks at Sending Force to Yugoslavia*, WASH. POST, Sept. 19, 1991, at A19; Carl J. Williams, *Croatia Mobilizes as Serbian Sees "Total War" Move*, L.A. TIMES, Oct. 7, 1991, at A1; Carl J. Williams, *Croatia Leader's Palace Attacked*, L.A. TIMES, Oct. 8, 1991, at A1. For an analysis of Northern Ireland, see Kevin Culler, *A Land Ruled by the Status Quo: As Political Talks Collapse, No One Is Surprised or Overly Upset: Northern Ireland*, BOSTON GLOBE, July 14, 1991, at 72. For a discussion of the Palestinian conflict, see David Mavosky, *Israel "Gave Nod" to Hussein's Visit to PNC Congress*, JERUSALEM POST, Oct. 2, 1991. Although these examples are illustrative of how this proposed rule would apply outside of Kuwait, they are beyond the scope of this Comment.

socially, economically, and politically unified. The right becomes legally cognizable when the group is subjected to foreign domination, recognizes its ethos as a "people," and expresses its desire for independence. Self-determination can take a variety of forms. Independence is the chosen form for groups that have demonstrated viability as a separate entity. Kuwait provides a contemporary example of a group that is entitled to invoke the right of self-determination in this form. As this example demonstrates, self-determination should be recognized in other situations similar to that of Kuwait.

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