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Leonard v.B. Sutton Award Paper

The Kurds' Right to Secede Under International Law: Self-Determination Prevails Over Political Manipulation

GREGORY J. EWALD*

*We are a people who faced genocide and managed to survive*¹

I. INTRODUCTION

It is unsettling to witness the rapid proliferation of secessionist movements around the world² absent any criteria, procedure, or institution capable of determining legitimate claims and monitoring the process. In fact, Western political philosophy noticeably lacks a theory of secession.³ Establishing criteria by which to judge secessionist

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1. Statement by Kurdish leader Massoud Barzani, *quoted in*, John Darnton, *Salahaddin Journal: A Son's Promise: That Kurds' Dream Doesn't Die*, Jan. 28, 1994, N.Y. TIMES, at A4.

2. See generally Arnold Beichman, *An Immunity that Sets U.S. Apart*, WASH. TIMES, Dec. 5, 1991, at G4. Cries for separatism, secession, and independence are heard around the world. Furthermore, ethnic minorities seek independence. It would seem that only a few countries are currently not involved in a secessionist struggle, namely the U.S. and Japan. *Id.* Many of these conflicts result from a heightened sense of ethnic awareness, or even a feeling of tribalism. Robin Wright, *The New Tribalism: Defending Human Rights in an Age of Ethnic Conflict; Ethnic Strife Owes More to Present than to History*, L.A. TIMES, June 8, 1993, at 1.

3. ALLEN BUCHANAN, SECESSION — THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 1 (1991); Allen Buchanan, *Toward a Theory of Secession*, 101 ETHICS 322, 323 n.1 (1991) (stating that major political philosophers like Plato, Aristotle, Hobbes, Locke, Rousseau, Hegel, Marx, and Mill failed to address the issue of secession in a meaningful manner). Secession has been justified on the theoretical basis that governments rule by consent of the people, which can be withdrawn at any time. See RIGO SUREDA, THE EVOLUTION OF THE RIGHT OF

claims has become a pragmatic necessity, in addition to being theoretically challenging.⁴ The United Nations (U.N.) is the logical institution to bear the burden of regulating secessionist claims, but it must be willing to include secession as a legitimate possibility under self-determination without limiting its application to narrowly defined colonial situations.⁵ Furthermore, the trend towards making individual human rights, rather than traditional state rights, the basis for international law must continue, reducing the opportunity for a state to use secession as a political tool to further its own self-interest.⁶

The issue of secession requires consideration of a number of seemingly incompatible international law principles. Territorial integrity, non-intervention and the prohibition against the use of force must be reconciled with the broad principle of self-determination.⁷ Additional-

SELF-DETERMINATION 17 (1973).

4. See, e.g., Lawrence M. Frankel, *International Law of Secession: New Rules for a New Era*, 14 HOUS. J. INT'L L. 521, 547-54 (1992) (discussing criteria for secession). See generally Lawrence S. Eastwood, Jr., *Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE J. COMP. & INT'L L. 299 (1993) (summarizing various theoretical positions on secession). But see Michael Eisner, *A Procedural Model for the Resolution of Secessionist Disputes*, 33 HARV. INT'L L.J. 407, 418-19 (1992) (arguing that establishing a procedure to resolve secessionist disputes is more important than formulating criteria because criteria fail to keep pace with changes in international law and politics).

5. Many people have criticized the U.N. for either failing to involve itself in secessionist struggles, or for limiting the legitimacy of secessionist claims to colonial situations. See, e.g., MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 1-76 (1982) (criticizing the U.N. for creating a double standard that limits secession to colonial situations where the dominant country is a Western power); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L Y. 257, 278 (1981) (recognizing the necessity for existing institutional structures within the U.N. to regulate secessionist claims, thereby adding predictability and avoiding violence). The international community must demonstrate a willingness to involve itself in secessionist struggles in order to resolve the dispute peacefully. Frankel, *supra* note 4, at 543-48.

6. Nations have typically used principles of international law, such as territorial integrity, to justify harsh treatment of secessionist movements within their borders. These same nations, however, have relied on other international law principles, i.e. self-determination, to justify aiding a secessionist group in another country. See LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 141-53 (1978) (after Belgium lost its colony of the Congo, it supported a secessionist movement in the Katanga region of the same country); Ved P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities — Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L LAW 321 (1972) (after failing to keep Pakistan a part of India, India supported the secession of Bangladesh from Pakistan).

7. E.g., POMERANCE, *supra* note 5, at 73; Debra A. Valentine, Note, *The Logic of Secession*, 89 YALE L. J. 802, 809 (1980); but see Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 178 (1991) (arguing that difficult normative issues arising out of secessionist claims are not incompatible with territorial integrity). In fact, the tension between territorial integrity and self-determination has severely hindered the international community's willingness and ability to intervene into secessionist struggles. Eisner, *supra* note 4, at 408. Interestingly, this tension may be broken if Canada were to allow Quebec to se-

ly, extending self-determination to include secession under certain situations must be consistent with the modern trend in international law of emphasizing human rights.⁸

This article briefly traces the development of self-determination and its relationship to secession. Next, it highlights several instances when states manipulated self-determination by using secession as a political tool to further their own self-interests. The article then addresses the difficult, but necessary, task of defining criteria and standards by which to evaluate secessionist claims. These criteria are then applied to the Kurds, concluding that they should be allowed to secede given, *inter alia*, the gross violation of human rights that has taken place in Turkey and Iraq. Finally, the article concludes with the recommendation that the international community should recognize secession as a legitimate right under certain circumstances and empower the U.N. to regulate secessionist claims by applying consistent criteria, thus promoting stability and reducing violence in the international community.

II. THE DEVELOPMENT OF SELF-DETERMINATION

President Woodrow Wilson first articulated the idea of self-determination at the beginning of the twentieth century. "Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril."⁹ The Wilsonian principle of self-determination arose out of the notion that all people had the right to self-government, including the freedom to select leaders and to consent to be governed.¹⁰ Wilson's idealism, a positive step towards furthering human rights under international law,

cede without opposition, thereby accepting self-determination as an overriding principle to territorial integrity. Gregory Marchildon & Edward Maxwell, *Quebec's Right of Secession under Canadian and International Law*, 32 VA. J. INT'L L. 583 (1992).

8. See UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 191 (1972) (recognizing a shift in emphasis away from state rights and toward a greater respect for individuals). Self-determination developed as an aspect of human rights belonging to a group, rather than an individual. *Id.* at 271. "International prescriptions based on authoritative human rights policies are penetrating the cloak of State sovereignty and are increasingly being implemented and enforced by world organizations." Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779, 833 (1976).

9. WOODROW WILSON, REPLY OF PRESIDENT WOODROW WILSON TO THE ADDRESSES OF THE IMPERIAL GERMAN CHANCELLOR, AND THE IMPERIAL AND ROYAL AUSTRO-HUNGARIAN MINISTER FOR FOREIGN AFFAIRS (1918), reprinted in OFFICIAL STATEMENTS OF WAR AIMS AND PEACE PROPOSALS, DECEMBER 1916 TO NOVEMBER 1918, 265, 268 (James B. Scott ed. 1921). See generally Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992) (providing a history of self-determination and criticizing the traditional application of self-determination as merely theoretical, thereby failing to regulate the conduct of states in practice).

10. POMERANCE, *supra* note 5, at 1.

did not address the pragmatic difficulty of defining who constitutes a group capable of exercising self-determination.¹¹

The League of Nations recognized self-determination but strictly circumscribed its application, making the territorial integrity and political independence of existing sovereign units the primary norm.¹² In the *Aaland Islands* case, a committee of jurists appointed by the Council of the League to investigate a claim by islanders under Finnish jurisdiction who wanted to join Sweden under the new principle of self-determination held that positive international law does not recognize the right of a group to separate themselves from a state.¹³ The committee's decision had a direct bearing on the early development of self-determination by holding that self-determination had not yet become positive international law and no attempt should be made to legitimize secession.¹⁴

The U.N. Charter expressly incorporated self-determination into Article 1(2) and Article 55.¹⁵ Although self-determination was initially considered an international legal principle rather than a right or binding law,¹⁶ the U.N. General Assembly passed several highly influential resolutions promoting the principle.¹⁷ This reinforced the belief

11. *Id.* at 2.

12. *Id.* at 8.

13. LEAGUE OF NATIONS O.J., Spec. Supp. 3, at 5 (1920). See also UMOZURIKE, *supra* note 8, at 180 (quoting from the *Aaland Islands* case).

14. UMOZURIKE, *supra* note 8, at 181. "The grant or refusal of the right to a section of the population to decide the sovereignty over a piece of territory by plebiscite or other means, the committee held, was an act of sovereignty and a matter within that state's internal jurisdiction." *Id.*

15. U.N. CHARTER art. 1, ¶ 2. The purposes of the U.N. are to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *Id.* "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 principle of equal rights and self-determination of peoples" U.N. CHARTER art. 55.

16. See BUCHHEIT, *supra* note 3, at 76 (recognizing the debate as to whether self-determination is a legal right or merely a political principle); POMERANCE, *supra* note 5, at 9.

17. The *Universal Declaration of Human Rights* makes the will of the people the basis of government authority. G.A. Res. 217A, U.N. GAOR, at 71, 75, U.N. Doc. A/810 (1948) [hereinafter Res. 217]. The *U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples* reaffirms fundamental human rights based on the principles of equal rights and self-determination of all peoples and the desire to end colonialism in all its manifestations. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) [hereinafter Res. 1514]. A second resolution passed in the same year states that self-government could be obtained by any of three means, including independence, association or integration. G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16., at 29, U.N. Doc. A/4684 (1960) [hereinafter Res. 1541]. The *U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* declares that subjugating peoples to alien domination is an ob-

that self-determination had evolved into a right under customary international law¹⁸ that is binding on all nations regardless of their consent.¹⁹ Furthermore, states are bound by the U.N. Charter to respect the principle of self-determination.²⁰ The definition of self-determination has evolved from "a personal freedom to make decisions . . . [into a] broader right to realize one's full potentialities as a human being."²¹ The principle also has become increasingly accepted in state practice and has appeared frequently in international treaties, U.N. documents, and International Court of Justice opinions.²² Although self-determination has attained the status of customary international law, some disagreement remains as to what, if any, limitations might apply. Acceptance has not necessarily brought agreement on the scope and content of self-determination.²³

An active debate currently exists as to whether self-determination has become a preemptory norm (*jus cogens*).²⁴ The strongest argument

stale to international peace and the principle of self-determination of peoples is a significant contribution to international law. G.A. Res. 2625, U.N. GAOR, 25 Sess., Supp. No. 28 at 121, U.N. Doc. A/8028 (1970) [hereinafter Res. 2625]. The *U.N. Declaration on the Right to Development* declares that the right to development implies the right of peoples to self-determination. G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 21, U.N. Doc. A/41/925 (1986).

18. Self-determination meets the objective test (extent and uniformity of application) and the subjective test (*opinio juris*), both of which are required for a principle to become customary international law. *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, at 44 (Feb. 20); UMOZURIKE, *supra* note 8, at 189. Self-determination has an extremely long history, creating a pedigree with a unique claim to legitimacy. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (arguing that self-determination provides a solid basis on which to build other rights including free expression and participation in an electoral process).

19. See UMOZURIKE, *supra* note 8, at 196.

20. *Id.*

21. Suzuki, *supra* note 8, at 834, quoting in part W. WAGAR, *BUILDING THE CITY OF MAN* 94-96 (1971).

22. See, e.g., Advisory Opinion on Western Sahara, 1975 I.C.J. 12 (recognizing the right of self-determination and holding that its application outweighs any past legal and historical ties between the people of the Western Sahara and Morocco or Mauritania) [hereinafter *Western Sahara Case*]; Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 [hereinafter *Namibia Case*].

23. This is no different, however, than other international law principles like non-intervention and self-defense. W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* 150, 178 (1977); Nanda, *supra* note 5, at 259 (stating that self-determination in the specific context of colonialism has reached the status of customary international law, but the content and scope of any further application is without consensus). Self-determination has developed, in theory, a broad normative role under international law but due to its ambiguity, self-determination has proven difficult to implement in practice. Eisner, *supra* note 4, at 410.

24. The hyperbole used by both proponents and opponents of self-determination as *jus cogens* tends to be little more than conclusory. Gross Espiell claims that "to-

against self-determination as *jus cogens* is the fact that it is not universally applicable in practice. The relative importance of self-determination compared to other normative principles, namely territorial integrity and nonintervention, is also debated, but the emerging majority opinion is that self-determination should outweigh inconsistent norms.²⁵ However, several of the same U.N. documents recognizing self-determination also limit its application when it conflicts with other principles.²⁶ Therefore, although self-determination has reached the status of customary international law, it probably fails to meet the requirements of *jus cogens*.

The primary theoretical foundation for justifying secession has been that (1) the consent of the people to be governed can be withdrawn; and (2) no self-determination actually occurred in colonial situations.²⁷ The U.N. and state practice first extended the right of self-determination to a right of secession in a colonial context.²⁸ Any legitimization of secession is somewhat remarkable given the strong historic bias against expanding the scope of self-determination. Former Sec-

day no one can challenge the fact that . . . the principle of self-determination necessarily possesses the character of *jus cogens*." POMERANCE, *supra* note 5, at 70. Opponents claim that to suggest self-determination is a principle of *jus cogens* is without any firm legal foundation because granting it to one group means denying it to another. *Id.* at 71.

25. "The denial of fundamental human rights for the sake of preserving the territorial integrity of a body politic is incompatible with the newly emerging principle of *jus cogens*." Suzuki, *supra* note 6, at 841. "If the principle of territorial integrity [sic] is clearly incompatible with that of self-determination, the former must, under present international law, give way to the latter." UMOZURIKE, *supra* note 8, at 187. *But see* BUCHHEIT, *supra* note 6, at 38 (stating that one response has been to establish a hierarchy of the norms of nonintervention, prohibition against the use of force, and self-determination, giving preference to the former two principles); R. J. VINCENT, NONINTERVENTION AND INTERNATIONAL ORDER 236 (1974) (arguing that the U.N. Charter was made with the primary concern of building order between states, thus emphasizing the established norm of nonintervention).

26. "Any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." Res. 1514, *supra* note 17. "Recalling 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." Res. 2625, *supra* note 17.

27. *See* BUCHHEIT, *supra* note 6, at 221 (when the tyranny is universal a revolution is justified, but when it is discriminatory secession is justified); SUREDA, *supra* note 3, at 17.

28. Self-determination appears in U.N. documents in order to overcome colonialism, not to legitimize secession. BUCHHEIT, *supra* note 6, at 84. However, the number of non-colonial claims to self-determination is likely to increase in number and intensity and it would be unwise for the international community to reject these claims as it has in the past. Nanda, *supra* note 6, at 322. In practice, international law evaluated the legitimacy of independence struggles by applying the norm of decolonization, which mandates that self-determination outweighs territorial integrity. In a non-colonial context, however, territorial integrity historically outweighed self-determination. Eisner, *supra* note 4, at 412.

retary of the U.N., General U Thant, unequivocally stated that the U.N. "has never accepted and does not accept and I do not believe will ever accept the principle of secession of a part of its Member State."²⁹ By including independence as one of the three methods by which self-government may be obtained, however, the U.N. at least implicitly legitimized secession under certain circumstances.³⁰ Furthermore, U.N. Resolution 2625 can be interpreted as authorizing secession if a group (people) can show they are governed by a non-representative government or are subject to unequal treatment.³¹ Virtually everyone agrees that secession is not a universal right.³² The debate arises in attempting to define when secession should be allowed. For example, international law does not give minorities dispersed throughout a country the right to secede.³³ At the other end of the spectrum, no rule of international law condemns secession under all circumstances.³⁴

The reluctance of states to fully accept a right of secession has slowed the trend towards a limited acceptance of the legitimacy of secession in international law.³⁵ It is understandable that states are reluctant to recognize a right of secession that could be used to justify

29. 7 U.N. MONTHLY CHRONICLE 36 (Feb. 1970) (quote taken from Nanda, *supra* note 5, at 263). See also HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 49 (1990).

30. Res. 1541, *supra* note 17 (including independence, association, or integration).

31. Res. 2625, *supra* note 17. See also Richard F. Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 1992 B.C. INT'L & COMP. L. REV. 213 (1992).

32. To apply secession as a truly universal right would extend it to each individual, legitimizing the frequently cited fear that a right of secession would lead to anarchy. See Buchanan, *supra* note 3, at 337-39. But see Robert W. McGee & Danny Kin-Kong Lam, *Hong Kong's Option to Secede*, 33 HARV. INT'L L.J. 427, 431-32 (1992) (arguing an absolutist position that individuals have the right to form the government of their choice regardless of their motives or timing).

33. Res. 1514 & Res. 1541, *supra* note 17 (limiting the right of self-determination to 'peoples,' which is interpreted as the people of a whole territory). PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 18 (1990). Criteria for secession are discussed *infra*, at section IV of this article.

34. UMOZURIKE, *supra* note 8, at 199. The various justifications for opposing secession are neither singularly nor cumulatively sufficient to deny secession under all circumstances. Buchanan, *supra* note 3, at 332. But see Iglar, *supra* note 31, at 239 (concluding that Slovenia and Croatia have a right to self-determination under international law, but they do not have a right to secede because secession is not recognized under international law).

35. BUCHHEIT, *supra* note 6, at 96-97 ("Thus, an historical survey . . . of the status of secessionist self-determination within the confines of positive international law confirms the evolution of a limited acceptance of its legitimacy."). Although historically secession found only limited legal authority, recent state practice in the Baltic states and Yugoslavia, to name only a few examples, demonstrates an emerging acceptance of secession under international law. See generally Eastwood, *supra* note 4, at 299. If Canada were to allow Quebec to secede, state practice would further support an emerging right of secession. Marchildon & Maxwell, *supra* note 7, at 583.

secessionist claims by groups within their own borders.³⁶ However, several peaceful secessions³⁷ and the incorporation of a right to secede into several constitutions³⁸ demonstrate that states have accepted secession to some degree. World-wide decolonization³⁹ and recognition of independent nations that seceded from the former Soviet Union⁴⁰ are further evidence that states have recognized the legitimacy of some secessionist claims through state practice. The reluctance, or willingness, of a state to recognize a right of secession, however, derives from the self-interest of that state.

III. STATE MANIPULATION OF SELF-DETERMINATION

States have traditionally used self-determination, and its most extreme manifestation of secession, to justify actions in furtherance of their own self-interest, while often denying it to other states,⁴¹ attempting to legitimize political actions using international law. In the Vietnam conflict, for example, "all sides claimed to be struggling in support of the right of 'self-determination.'"⁴² This manipulation of international law to justify politically self-serving use of force has a destabilizing effect on the world community. Clearly, what is one group's war of national liberation is also another group's war of national disintegration.⁴³

Historically, both the United States and the Soviet Union have manipulated the principle of self-determination to achieve a political

36. *Id.*

37. For example, the government of Senegal peacefully seceded from the Mali Federation in 1960 and Singapore seceded from the Malaysian Federation in August of 1965 under amicable conditions. *Id.* at 99.

38. The constitution of the former Soviet Union prophetically contained a provision in article 17 that "the right freely to secede from the U.S.S.R. is reserved to every Union Republic." *Id.* at 100. See also Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991). Including a right to secede in a constitution may in fact endanger the democratic process, rather than protect it. Sunstein recognizes a right to secede under certain circumstances, but it should be considered a natural part of constitutionalism and need not be expressly granted in the constitution. *Id.* at 670. At least one commentator argues that the Confederate states acted legally in seceding from the Union because the U.S. Constitution did not forbid secession. H. Newcomb Morse, *The Foundations and Meaning of Secession*, 15 STETSON L. REV. 419 (1986). See also BUCHANAN, *supra* note 3, at 127-49 (discussing constitutional provisions for secession).

39. See BUCHHEIT, *supra* note 6, at 100-01.

40. See, e.g., Douglas Jehl, *Bush Baltic Move Seeks to 'Keep Pressure' On*, L.A. TIMES, Sept. 3, 1991, at A1 (listing the countries that immediately established diplomatic ties with the Baltic states).

41. POMERANCE, *supra* note 5, at 61. Political manipulation, along with the inherent inconsistency between self-determination and territorial integrity, removed the international community and international law from playing a meaningful role in resolving secessionist disputes. Eisner, *supra* note 4, at 415.

42. POMERANCE, *supra* note 5, at 59.

43. *Id.* at 54.

agenda. The Soviet Union disapproved of the dissolution of the Mali Federation, where their influence was increasing, but supported the secessionist movement in Bangladesh.⁴⁴ The Soviet decision "was apparently dictated by political expediency and not a principled judgment regarding the legitimacy of the particular claim."⁴⁵ The United States recognized the legitimacy of secessionist movements in the former Soviet Union but failed to recognize the legitimacy of other secessionist struggles less favorable to U.S. interests.⁴⁶ Even in recognizing the independent Baltic nations, President Bush could not avoid phrasing his support in self-serving nationalistic terms. "The Soviet Union is no more . . . [and] this is a victory for democracy and freedom. The United States applauds and supports the historic choice for freedom of the new states . . . [and] these events clearly serve our national interests."⁴⁷

Developing nations also have manipulated the principle of self-determination, making its abuse a reality of international politics.⁴⁸ In fact, countries that recently gained independence — many times through secession — from a colonial power under the auspices of self-determination immediately deny the same right to groups within their borders.⁴⁹ The Ethiopian Emperor, Haile Selassie, summed up the general feeling of African leaders when he said "that the national unity of individual African states was an 'essential ingredient for the realization of the greater objective of African unity.'⁵⁰ This attitude contradicts the prevailing trend in international law of protecting hu-

44. BUCHHEIT, *supra* note 6, at 127.

45. *Id.*

46. The Kurds' struggle, for example, continues to be used as a political tool by the United States and other countries to further their own self-interests in the region. Discussed *infra* at section V of this article.

47. Doyle McManus, *Bush Praises Gorbachev, Recognizes 6 Republics*, L.A. TIMES, Dec. 26, 1991, at A1 (quoting a nationally televised address made by President Bush on Dec. 25, 1991).

48. "The credo of the Third World has been aptly epitomized by Emerson to read: 'My right to self-determination against those who oppress me is obviously unimpeachable, but *your* claim to exercise such a right against me is wholly inadmissible.'" POMERANCE, *supra* note 5, at 61 (quoting in part Rupert Emerson, *Self-Determination Revisited in the Era of Decolonialization* (Occasional Papers in International Affairs, no. 9; Harvard University, Center for International Affairs, Dec., 1964)).

49. "Leaders of newly independent states have been consistently vocal in asserting that the right to self-determination does not include the right of secession." Nanda, *supra* note 5, at 271. African countries that obtained independence from European countries by exercising their right to self-determination have been notoriously hypocritical in denying that right to groups within their artificially created borders. See *African Charter on Human and Peoples' Rights*, June 27, 1981, entered into force Oct. 21, 1986, reprinted in 21 I.L.M. 58 (1982) (Article 20 restricts self-determination to colonial situations, while Article 29(5) requires the individual to preserve the nation's territorial integrity). See generally POMERANCE, *supra* note 5, at 1-76.

50. Report of the O.A.U. Consultative Mission to Nigeria, cited in Nanda, *supra* note 5, at 272.

man rights, even over state rights, when the two conflict.⁵¹

Although it would be difficult to assert that the United Nations also has acted out of self-interest in its treatment of secessionist claims, it is not unfair to conclude the U.N. has been ineffective at best.⁵² In failing to regulate secessionist claims, the U.N. has allowed states to freely pursue their own self-interests. When Biafra attempted to secede from Nigeria, the U.N. somehow managed to ignore a thirty-month, bloody civil war.⁵³ In fact, the U.N. never even discussed the conflict, even though Biafra took an appeal before the U.N. in December of 1967 charging Nigeria with human rights violations such as genocide.⁵⁴ In the absence of a collective international judgement regarding the legitimacy of Biafra's secessionist claim, states freely intervened on behalf of the side most likely to further their own self-interests.⁵⁵ The U.N. was also conspicuously inactive in the subsequent secessionist struggle between Bangladesh and Pakistan.⁵⁶ Once again, the U.N. failed to even discuss the matter until India and Pakistan were involved in a full-scale war.⁵⁷ Bangladesh successfully seceded from Pakistan primarily due to India's self-serving military intervention.⁵⁸ The one instance when the U.N. did intervene was in opposition to Katanga's effort to secede from the Congo, and even then the U.N. waited until Belgium had intervened on behalf of Katanga.⁵⁹ The U.N. justified this as preventing Belgium from recolonizing its previous colony, refusing to intervene until there was a Western colonial power involved, and applying self-determination to a narrowly defined colonial context.⁶⁰

The only certain lesson to be learned from examining state practice regarding self-determination and secession is that a state's response to a given situation will usually be determined solely by its own political interest.⁶¹ Thus, most states will be critical of secessionist

51. See Robert Cullen, *Human Rights Quandary*, 71 FOREIGN AFF. 79 (Winter 1992/1993).

52. The U.N. has been criticized for creating two standards regarding the legitimacy of secession, allowing it when a colony secedes from a Western country but denying it to any group within an existing state. See POMERANCE, *supra* note 5, at 17 (stating that an arbitrary requirement of colonial status is racist and subjective).

53. See BUCHHEIT, *supra* note 6, at 162-76.

54. See *generally Documents: Biafra/Nigeria*, 2 N.Y.U. J. INT'L L. & POL. 398 (1969), cited in Nanda, *supra* note 3, at 273 n.106.

55. BUCHHEIT, *supra* note 6, at 170.

56. Nanda, *supra* note 5, at 274. See *generally* BUCHHEIT, *supra* note 6, at 198-215.

57. Nanda, *supra* note 5, at 274.

58. India stopped the massive flow of refugees from Bangladesh and weakened a regional adversary, while gaining a potential ally. See *generally* Nanda, *supra* note 6.

59. Nanda, *supra* note 5, at 273-74. See *generally* BUCHHEIT, *supra* note 6, at 141-53.

60. See *generally* BUCHHEIT, *supra* note 6, at 141-53.

61. *Id.* at 105.

movements in other countries not affecting their own interests because it creates a precedent, possibly legitimatizing secessionist struggles that someday may occur within their own territory.⁶² A state is almost certain, however, to intervene on behalf of one side in a secessionist struggle if it will secure a new ally or defeat an old enemy.⁶³ In light of the power vacuum created by the collapse of the Soviet Union⁶⁴ and the end of the Cold War Era, states are likely to continue promoting their own self-interests unless the U.N. actively evaluates the legitimacy of secessionist claims by consistently applying agreed upon criteria. States will still have the political tool of formal recognition of statehood,⁶⁵ but it should be restricted and in compliance with U.N. standards.⁶⁶

IV. STANDARDS AND CRITERIA FOR SECESSION

A group seeking to secede must first satisfy the requirements of self-determination before accessing the extreme remedy of secession. Attaining independence constitutes one of the methods by which the ultimate goal of self-government may be obtained.⁶⁷ The right of self-determination distinguishes legitimate claims of secession from illegitimate claims.⁶⁸ Although self-determination has reached the status of customary international law, individuals can only exercise this right in the context of a group.⁶⁹ Thus, the existence of an identifiable group constitutes the first, and perhaps most ambiguous, criterion.⁷⁰

62. *Id.*

63. *Id.*

64. See Arthur M. Cox, *In a National Tailspin, the Soviet Union Must Fill the Power Vacuum*, L.A. TIMES, Sept. 29, 1991, at M2.

65. "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987).

66. A state is not required to formally recognize another state but is required to treat it as a state if the requirements for statehood are met, except when statehood was attained by the use of armed conflict in violation of the U.N. Charter. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 202 (1987). Refusing to treat an entity attempting to secede as a state may be required because premature acceptance would violate the territorial integrity of the dominant state and military support may violate the U.N. Charter. *Id.*, § 202 cmt. f (1987).

67. Res. 1541, *supra* note 17. See Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 STAN. J. INT'L L. 451 (1992) (summarizing the basic arguments for and against secession).

68. OFUATEY-KODJOE, *supra* note 23, at 162.

69. Although potentially arbitrary in nature, this limitation is sensible because individuals are generally more likely to consent to be governed by people similar to themselves and governments have historically tended to oppress distinct groups within the population. BUCHHEIT, *supra* note 6, at 228. *But see* DOV RONEN, THE QUEST FOR SELF-DETERMINATION 8 (1979); McGee, *supra* note 67, at 451 (stating that individuals have the unilateral right to secede but are inhibited in their exercise of that right by practical and logistical restraints).

70. See Nanda, *supra* note 5, at 275. See also Brilmayer, *supra* note 7, at 192-93

Group identity is determined through the application of both subjective and objective standards.⁷¹ The subjective self-identity of a group can be judged on the basis of a variety of common, objective characteristics, including religion, language, ethnicity, and race.⁷² Group identity can also be based on "subjective expectations shared by a significant number of people that their condition will be improved by membership in that particular association."⁷³ A common claim to specific territory, rather than a common culture, also may define a 'group.'⁷⁴ In addition to the problem of quantifying the subjective mental state of group members, difficulties arise in evaluating the objective criteria.⁷⁵ Although the standards used to evaluate the existence of an identifiable group are somewhat ambiguous, refusing to recognize a 'group' under all circumstances is unwarranted.⁷⁶

The relationship between group members and their leaders measures the cohesiveness of a group and the extent to which individual members share common perceptions and values.⁷⁷ The purported leaders of a group should represent the opinions of the group as a whole.⁷⁸ When the interests of the leaders are different from those of the group in general, the claim will fail for lack of a legitimate identifiable group.⁷⁹

A plebiscite clearly determines the general interests and choice of the community⁸⁰ but requires an impartial third party like the U.N., established procedures, and parties willing to submit to the authority of the procedure.⁸¹ The plebiscite itself is not the exercise of self-de-

(defining the group as people with a common claim to territory wrongly taken from them, rather than in ethnic or cultural terms).

71. See Nanda, *supra* note 5, at 276; Iglar, *supra* note 31, at 214, 225.

72. See OFUATEY-KODJOE, *supra* note 23, at 156-57; Nanda, *supra* note 5, at 276.

73. Suzuki, *supra* note 8, at 786.

74. See generally Brilmayer, *supra* note 7, at 177-202 (defining a group based on a common territorial claim seems less arbitrary and more objective than ethnicity and culture).

75. Buchanan, *supra* note 3, at 329. For example, to what extent should linguistic dialects be considered as the same language or distinct languages? If 'culture' is broadly defined, a group may be in effect penalized for exhibiting cultural pluralism. *Id.*

76. UMOZURIKE, *supra* note 8, at 200. International law should protect the right to secede but prevent its abuse. The possibility that such abuses may occur, however, does not invalidate the law. *Id.*

77. See Nanda, *supra* note 5, at 276.

78. Suzuki, *supra* note 8, at 816.

79. *Id.* An example of an illegitimate claim where the interests of the group and its purported leaders were in conflict is the Southern Rhodesian unilateral declaration of separation from Great Britain in 1965, where minority white leaders would have continued to deny the black majority fundamental human rights. *Id.*

80. OFUATEY-KODJOE, *supra* note 23, at 163. *But see* POMERANCE, *supra* note 5, at 27 (arguing that a free and fair election is not a panacea but rather raises additional questions regarding who constitutes the real population of a territory).

81. Valentine, *supra* note 7, at 813. The U.N. has carried out several successful

termination but merely a tool to determine whether an identifiable group exists and how that group would exercise its self-determination.⁸² Two other considerations must be resolved in order to carry out an effective plebiscite: (1) establishing the percentage of the group required to authorize action; and (2) protecting those who are opposed.⁸³ Furthermore, there are many more potentially legitimate groups than possible viable states.⁸⁴ Even though establishing the existence of an identifiable group may be difficult enough to reduce some claims, additional criteria are needed in order to further limit the scope of secession as an option under self-determination.⁸⁵

In addition to satisfying the requirement of a 'group' as defined above, a legitimate claim of self-determination and a right to secede require some type of subjugation,⁸⁶ which provides the most important basis for authorizing self-determination and extending it to include secession.⁸⁷ The basis for declaring a status of subjugation derives from the relationship between the ruling group and the group claiming a right to self-determination.⁸⁸ The relationship between a ruling colonial power and its colony has most easily satisfied this criterion. "Colonialism came to be branded not only as a 'permanent aggression' but as a 'crime', and an evil so paramount [it] deserved . . . to be eradicated by all possible means."⁸⁹ 'Colonialism' eventually came to include "social institutions which systematically and deliber-

plebiscites, including those in the British Cameroons, Rwanda, Sabah, and Sarawak. See UMOZURIKE, *supra* note 8, at 183. However, the U.N. failed to apply internationally accepted standards to the election in West Irian, instead allowing traditional Indonesian practices to virtually guarantee that the state would join the Indonesian Republic regardless of the people's genuine preference. POMERANCE, *supra* note 5, at 33. For a general discussion on election monitoring, see YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS — SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994).

82. OFUATEY-KODJOE, *supra* note 23, at 163.

83. Nanda, *supra* note 5, at 276.

84. Buchanan, *supra* note 3, at 329.

85. A pure Parochialist Model only requires an identifiable group seeking control of their political future, but the disruptive nature of allowing any identifiable group to claim a right of self-determination as the basis for secession makes this view almost entirely unaccepted. BUCHHEIT, *supra* note 6, at 223-24.

86. OFUATEY-KODJOE, *supra* note 23, at 157. "The beneficiary of the right of self-determination is a self-conscious *politically coherent* community that is under the political subjugation of another community." *Id.* at 156. *But see* Buchanan, *supra* note 3, at 325 (arguing that since there is currently no theory of secession, it would be inappropriate to reject secessionist claims based on grievances other than an injustice, even though this might become the standard in the future).

87. OFUATEY-KODJOE, *supra* note 23, at 157. The U.N. has evaluated virtually all claims in light of this criteria. *See, e.g.*, Res. 1514, *supra* note 17 ("The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights.").

88. OFUATEY-KODJOE, *supra* note 23, at 157.

89. POMERANCE, *supra* note 5, at 49.

ately deprive particular groups of their human rights."⁹⁰

A violation of fundamental human rights emerged as a substitute criterion for subjugation, while colonialism became a *per se* violation of fundamental human rights.⁹¹ Determining the degree and nature of oppression against the group becomes the threshold test.⁹² If members in the group are exercising the rights of citizens, enjoying fundamental human rights, and enhancing their political, cultural, and economic development, no basis exists for claiming a right to self-determination.⁹³ This appears to be the *lex lata*, with the degree of oppression dictating the available remedy, which would range from protection of minority rights to the ultimate remedy of secession.⁹⁴

An identifiable group suffering some type of human rights violation or subjugation satisfies the two criteria necessary for claiming a right to self-determination but not necessarily the requirements for claiming a right to secede. The international community tends to disfavor outright secession, treating it as a remedy of last resort.⁹⁵ There is an implicit criterion that in order to completely legitimize a secessionist claim, the group first must make an effort to remedy the problem through a less extreme alternative method.⁹⁶ The disgruntled group can add a degree of legitimacy to their secessionist claim if they first attempt to remedy the problem through other channels.⁹⁷ This criterion also requires a neutral third party, preferably the U.N., to encourage negotiations between the disgruntled group and the government and to determine if and when the group may legitimately claim a right to secede. Requiring a disgruntled group to first attempt a remedy short of secession eases some of the fears in the international community, making a liberal application of self-determination acceptable to more states and increasing the likelihood truly legitimate secessionist claims outside the scope of decolonization will be recognized.⁹⁸

90. Suzuki, *supra* note 8, at 838.

91. See generally POMERANCE, *supra* note 5, at 1-76.

92. See BUCHHEIT, *supra* note 6, at 220-23 (referring to this as Remedial Secession in contrast to the Parochial Model discussed *supra* in note 85).

93. UMOZURIKE, *supra* note 8, at 268-69. It is argued that a truly democratic government based on fair representation presumably fulfills the goal of self-determination, namely self-government, and weakens any claim of subjugation or human rights violations. See *id.* at 185.

94. BUCHHEIT, *supra* note 6, at 222.

95. See *id.* at 214. Remedies other than outright independence, such as autonomy or association, may be adequate and more acceptable to the international community. OFUATEY-KODJOE, *supra* note 23, at 189.

96. One suggested alternative is to let the subgroup retain its common personality, while encompassing their identification with the broader political body. Suzuki, *supra* note 8, at 859.

97. By first attempting political and constitutional innovations through existing constitutional channels before resorting to secession, the Ibos of Nigeria and Bengalis of Bangladesh added legitimacy to their claim. *Id.* at 805.

98. See OFUATEY-KODJOE, *supra* note 23, at 189.

Whether a group must have a territorial claim in order to legitimately secede is currently under debate.⁹⁹ Semantically, to secede merely means to withdraw from a larger organization, implying that the group must have somewhere to go. A group may secede and join another state through association or integration, requiring no territorial claim of its own.¹⁰⁰ Furthermore, no territorial claim has been required for secessionist claims in a colonial context.¹⁰¹ It is logical, however, to require a territorial claim when a group secedes from a sovereign country and does not join another state, since the group must take territory from an existing state.¹⁰²

A strict territorial interpretation requires a valid claim to territory, usually based on an historical grievance, in order to access secession as a legitimate remedy.¹⁰³ A minority group without a territorial claim suffering human rights violations still has a grievance, but it cannot legitimately claim secession as a remedy.¹⁰⁴ An historical grievance arises from a wrongful acquisition of territory. The remedy, including possibly secession, is proportionate to the responsibility of the dominant party in power in wrongfully acquiring that territory.¹⁰⁵ Furthermore, under a modified territorial interpretation, a valid territorial claim may automatically satisfy the subjugation criterion if the territory was unjustly incorporated into the larger state.¹⁰⁶ Recently, this was a significant justification for secessionist movements within

99. See Brilmayer, *supra* note 7, at 177-202 (arguing that a territorial claim based on an historical grievance is the only legitimate claim to secede). See also BUCHHEIT, *supra* note 6, at 229-30 (requiring a territorial claim for groups to actually secede but not to politically remove themselves); Suzuki, *supra* note 8, at 782 (the group demanding separation must have an appropriate territorial base); Valentine, *supra* note 7, at 818-19 (stating that an identifiable land base is an indicium of a secessionist claim). But see OFUATEY-KODJOE, *supra* note 23, at 164 (a territorial claim is only relevant when the boundaries are in dispute); Buchanan, *supra* note 3, at 332 (arguing discriminatory redistribution justifies secession absent any territorial claim).

100. OFUATEY-KODJOE, *supra* note 23, at 164. See also Res. 1541, *supra* note 17. But see Nanda, *supra* note 5, at 277 (legitimizing secession based on such principles would undermine international stability).

101. See OFUATEY-KODJOE, *supra* note 23, at 164; Buchanan, *supra* note 3, at 332.

102. Without a valid territorial claim, the group would in effect take on the status of refugees or emigrants. Buchanan, *supra* note 3, at 326-27 (stating that secessionists only deny the authority of the state over the group and the territory they occupy, not the state's authority in general).

103. Brilmayer, *supra* note 7, at 192.

104. *Id.* at 193. But see Buchanan, *supra* note 3, at 328 (agreeing with Brilmayer in part but denying that a territorial claim based on an historical grievance is the only justification for secession).

105. Brilmayer, *supra* note 7, at 197 (claiming colonialism is an automatic justification for an historical grievance and thus a right to secede).

106. Buchanan, *supra* note 3, at 329-30. This theory is most plausible when the group seeking to secede is the same group that held legitimate title to the territory when it was unjustly annexed. *Id.*

the former Soviet Union.¹⁰⁷

A state created by secession must be politically and economically viable, so as not to burden the international community.¹⁰⁸ This criterion is easier to meet today than in the past, given the emergence of many small, but successful, nation-states.¹⁰⁹ The U.N. codified a relaxed standard in Resolution 1514, which declares "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."¹¹⁰ Technological advances and the development of international economic and military alliances have reduced the necessity for a large land base.¹¹¹ The U.N. would evaluate the state's viability by considering the population, size, natural resources, and infrastructure. Unlike other criteria, the U.N. might consider the willingness of existing states to recognize the new state, since viability is largely dependent upon economic and political allies. Although viability may not be determinative alone, it should be considered along with other factors in evaluating the strengths of the secessionist claim.

The overall method for evaluating a secessionist claim is a balancing test, primarily weighing the benefits of allowing secession against the burdens.¹¹² A seceding group has at least three tools at its disposal to achieve its goal of secession: (1) international pressure; (2) moral persuasion; and (3) brute force.¹¹³ The ultimate goal is to maximize world harmony by striking a balance between individual human rights and state sovereignty.¹¹⁴ The level of disruption in the international community is the determinative factor.¹¹⁵ This disruption includes the effect of secession on the remaining state. For example, would the loss of land, people, or resources critically impair the viability of the remaining state?¹¹⁶ The disruptive factor is also measured by the effect of the secession on other nations. Additional considerations include the precedent of allowing a successful secession and the impact of

107. *Id.* at 329. See also *Now the U.S. Should Help the Baltics Join the UN*, *NEWSDAY*, Sept. 5, 1991, at 58 (stating that the Baltic states were forcibly and illegally incorporated into the Soviet Union in a secret deal between Stalin and Hitler in 1940).

108. See BUCHHEIT, *supra* note 6, at 29.

109. Suzuki, *supra* note 8, at 834-35.

110. Res. 1514, *supra* note 17.

111. See Valentine, *supra* note 7, at 811 nn. 48-49.

112. See BUCHHEIT, *supra* note 6, at 238-45.

113. Frankel, *supra* note 4, at 530.

114. BUCHHEIT, *supra* note 6, at 238-45 (referring to this as the Utilitarian Approach, in contrast to the Parochial Model, *supra* note 85, and Remedial Secession, *supra* note 92).

115. *Id.* The fundamental goal is optimum public order. Suzuki, *supra* note 8, at 793.

116. The amount of disruption is high if secession threatens to remove a key economic base of the country, as was the case when Katanga attempted to secede from Nigeria. BUCHHEIT, *supra* note 6, at 232.

armed conflict or an influx of refugees on surrounding nations. The ability of the seceding entity to survive independently and to abide by international law are also important factors.¹¹⁷ Finally, the current disruption and potential future disruption likely to occur if the group is not allowed to secede must be evaluated.¹¹⁸ Continuing violations of *jus cogens* may be so repulsive to the international community that its disruptiveness outweighs that of a secessionist struggle.¹¹⁹ The use of force and violence will also be a key element in determining the degree of disruptiveness.¹²⁰

It is a difficult task to reconcile the idealistic goal of prohibiting the use of force under international law as a method of achieving goals and the pragmatic reality that some degree of force will inevitably be used. The use of force or violence by either the secessionist group or the dominant state will draw the attention of the international community.¹²¹ The use of power is closely related to the issue of respect.¹²² "Coercive operations without the support of the world community will deprive the coercers of respect."¹²³ The willingness of a secessionist group to enter into an armed struggle, however, demonstrates group identity and resolve.¹²⁴ It may also shift world opinion in their favor if the dominant state resorts to an overwhelming use of force to repress the secessionist movement, as was the case when Pakistan began fighting Bangladesh¹²⁵ and when the Yugoslavian army harshly responded to secessionist movements.¹²⁶ On the other hand, if the secessionist group appears to be nothing more than a terrorist organization, they will lose any chance for legitimacy in the international community. Unfortunately, nations within the world community historically have responded to secessionist struggles when their political self-interests required such action.¹²⁷

117. If international charity will likely become the method for maintaining economic viability, the international community has a legitimate concern. *Id.*

118. *Id.* at 235.

119. Namibia Case, *supra* note 22, at 72. The internal conditions of human rights within a country and the level of international order are interrelated, thereby making gross violations of human rights a concern of the international community. Suzuki, *supra* note 8, at 836-37.

120. See Valentine, *supra* note 7, at 819-20.

121. *Id.* at 819.

122. Suzuki, *supra* note 8, at 855.

123. *Id.*

124. See Namibia Case, *supra* note 22 (separate opinion by Ammoun, J.) (stating that the Namibian people asserted their international personality through violent struggle), cited in Valentine, *supra* note 7, at 819.

125. See generally, Nanda, *supra* note 6, at 321-36.

126. See Jill Smolowe, *Yugoslavia: Out of Control*, TIME, July 15, 1991, at 26. At first, European and U.S. officials reacted negatively to secessionist movements, calling for the preservation of territorial integrity. They changed their position after the Yugoslavian army acted violently, calling for self-determination. *Id.*

127. Frankel, *supra* note 4, at 531.

The effect of violence on the legitimacy of a secessionist claim must be evaluated using the twin criteria of necessity and proportionality.¹²⁸ When the secessionist group resorts to the use of force unnecessarily and without provocation, the state may use a proportionate amount of force in response.¹²⁹ If the state uses unnecessary and disproportionate force to suppress a peaceful effort to secede, however, this may constitute a human rights violation or subjugation, adding legitimacy to the secessionist claim.¹³⁰ Thus, the use of force cannot be completely prohibited, but it also should not be rewarded.

Legal and political issues also should be considered in evaluating the burdens of allowing secession. The legal considerations would include *pacta sunt servanda*, territorial integrity, prohibition against the use of force, recognition, and nonintervention.¹³¹ Political considerations would include the fear of balkanization, fragmentation, and destabilization of the international community.¹³² The dominant state may justifiably invoke self-defense as a basis for denying secession if a successful secession would end the existence of the remaining state.¹³³ The secessionist group must be willing and able to protect the individual rights of its members after attaining independence. This argument can be extended to deny secession on the grounds that the new state would not only deny its current members fundamental rights but also future members their fundamental rights.¹³⁴ The potential abuse of using the threat of secession as a bargaining tool to obtain disproportionate political power, contrary to a theory of majority rule, also causes concern.¹³⁵ Finally, the most frequently cited burden of allowing secession is that there would be no way of limiting it once the process began, resulting in complete anarchy.¹³⁶

In order to overcome an inherent bias against secession,¹³⁷ the benefits must clearly outweigh the perceived burdens. Furthermore, the seceding entity must demonstrate viability through *de facto* control.¹³⁸ Since the state suffers a burden to some extent in any secessionist claim, the group and the international community must demon-

128. These are the same two criteria used to justify self-defense claims under international law. U.N. CHARTER art. 51. See also Ved P. Nanda, *The Validity of United States Intervention in Panama under International Law*, 84 AM. J. INT'L L. 494 (1990).

129. See BUCHHEIT, *supra* note 6, at 237.

130. *Id.*

131. Nanda, *supra* note 5, at 263.

132. *Id.* at 264.

133. Buchanan, *supra* note 3, at 332-35 (stating that self-defense will only justify denying secession under stringently confined circumstances).

134. *Id.* at 335-36 (referring to this as the 'soft paternalist argument').

135. *Id.* at 336-37 (calling this the 'strategic bargaining argument').

136. See, e.g., *id.* at 337-39.

137. Frankel, *supra* note 4, at 535-38.

138. *Id.* at 534.

strate a significant benefit. The primary consideration in determining the benefits of secession is the degree of subjugation or violation of human rights suffered by the secessionist group and the extent to which secession would eliminate the problem.¹³⁹ The benefit of returning territory wrongfully taken from the seceding group is another consideration.¹⁴⁰ A secessionist claim that truly advances fundamental human rights is consistent with the recent willingness of the international community to emphasize individual human rights over state rights.¹⁴¹ The international community, as well as the parties involved, may benefit from allowing secession rather than requiring a disgruntled group to remain in the existing state through the use of force. In addressing the Yugoslavian situation, German Chancellor Helmut Kohl stated that "countries cannot be held together by tanks and force."¹⁴²

A somewhat obscure argument made by Leopold Kohr, an Austrian-born economist, is worth noting as the international community undergoes significant change. He believed that the spirit among people who regain national independence would lead to many positive results, including "peace, economic revival, a flowering of the arts and true participation by all citizens in democratic government."¹⁴³ Furthermore, secession does not necessarily mean permanent disunion and anarchy as once thought. The newly independent states will freely reorganize themselves in order to prosper in the international market.¹⁴⁴ Lastly, the widespread acceptance of self-determination as customary international law demonstrates the principle's strong appeal and benefits.¹⁴⁵ These inherent benefits in allowing people to freely determine their government should reduce the traditional bias against secession, making it easier to satisfy the balancing test in favor of secession.

V. THE KURDS

In examining the effect of self-determination on the Kurds and applying the above criteria to their situation, several startling conclusions may be drawn. First, few groups (peoples) can make a stronger

139. See generally *id.*

140. See generally Brilmayer, *supra* note 7, at 802-24; Buchanan, *supra* note 3, at 322-42.

141. See Suzuki, *supra* note 8, at 862 (concluding that a choice should be made that establishes the enjoyment of all human rights as the fundamental basis).

142. Smolowe, *supra* note 126, at 26.

143. John McClaghry, *A Visionary of Disunion*, N.Y. TIMES, Dec. 28, 1991, § 1, at 19.

144. See *New Slant on Union*, CHRISTIAN SCIENCE MONITOR, Dec. 11, 1991, at 20.

145. For some members of the U.N., self-determination "has become the preemptory norm of international law, capable of overriding all other international legal norms and even such other possible preemptory [sic] norms as the prohibition of the threat or use of force." POMERANCE, *supra* note 5, at 1.

case for self-determination than the Kurds.¹⁴⁶ Second, the Kurds have a strong, although not infallible, claim to a right of secession under the above criteria. Third, the international manipulation of the Kurds exemplifies the historical use of self-determination and secession as tools for selfishly furthering state interests at the expense of human rights. Lastly, the Kurds have suffered greatly from the lack of an international institution capable of regulating secessionist claims.

In order to claim a right to self-determination, the Kurds must demonstrate that they (1) constitute an identifiable group; and (2) are suffering some type of significant grievance. Substantial objective evidence supports the conclusion that the Kurds are a distinct and identifiable group.¹⁴⁷ They are the descendants of the biblical Medes,¹⁴⁸ thus giving them a common ethnicity. Furthermore, the Kurds have strikingly different physical features from other peoples living in the region.¹⁴⁹ The Kurds are Aryan, making them racially different from many other regional groups.¹⁵⁰ The Kurds speak a distinct language of the Indo-European group, in contrast to the Semitic-speaking Arabs in Iraq and Turkic speakers in Turkey.¹⁵¹ The Kurds are generally Sunni Muslims, whereas the state religion in Iran is Shiism.¹⁵² Lastly, the Kurds have a long nomadic tradition and a distinct culture.¹⁵³

The Kurds also subjectively consider themselves a distinct people, further strengthening the proposition that they are an identifiable group. In addition to the numerous objective criteria listed above, the strongest evidence supporting the Kurds subjective group identity is that they have managed to retain their distinct culture and ethnicity even though they are a minority population in several different countries.¹⁵⁴ The largest Kurd populations are in Turkey (up to 10 mil-

146. *Turkey's Kurds*, CHRISTIAN SCIENCE MONITOR, Apr. 3, 1992, at 20. See generally YOSEF GOTTLIEB, SELF-DETERMINATION IN THE MIDDLE EAST 72-105 (1982); Sarah E. Whitesell, *The Kurdish Crisis: An International Incident Study*, 21 DENV. J. INT'L L. & POL'Y 455 (1993).

147. See generally MARTIN VAN BRUINESSEN, AGHA, SHAIKH AND STATE: THE SOCIAL AND POLITICAL STRUCTURES OF KURDISTAN (1992) (discussing Kurd loyalties); DAVID MCDOWALL, THE KURDS — A NATION DENIED (1992) (discussing internal and external barriers to establishing a Kurdish nation); NADER ENTESSAR, KURDISH ETHNONATIONALISM (1992) (using the Kurds to illustrate how an ethnic group can refuse to integrate into contemporary nation-states).

148. See STEPHEN C. PELLETIERE, THE KURDS: AN UNSTABLE ELEMENT IN THE GULF 20-23 (1984).

149. See *id.* at 16 (stating that the Kurds are renowned for their striking physical features, which have been largely preserved by not interacting with other peoples).

150. See BUCHHEIT, *supra* note 6, at 158-62 (discussing the Kurds); PELLETIERE, *supra* note 148, at 19.

151. PELLETIERE, *supra* note 148, at 19.

152. See *id.*

153. See *Turkey's Kurds*, *supra* note 146, at 20.

154. *Kurds: The State that Never Was*, ECONOMIST (U.K. ed.), June 24, 1989, at 38 [hereinafter *Kurds*]. See also Stephen Fay, *Born Losers?*, INDEPENDENT (London),

lion), Iran (up to 5 million), and Iraq (up to 4 million).¹⁵⁵ The poor treatment received by the Kurds in different countries throughout history caused one Kurdish leader to refer to his people as the "orphans of the universe."¹⁵⁶ It is no wonder that Kurds identify more closely with other Kurds than with the people of the state in which they reside.

The Kurds' nomadic nature and their traditional allegiance to tribal leaders somewhat weakens their group identity.¹⁵⁷ This factionalism is still apparent in modern Kurdish politics, where at least three different leaders lead three different parties and each demands a different degree of autonomy for the Kurds.¹⁵⁸ In Iraq, the Kurdish Parliament is split evenly between Mr. Barzani's Kurdish Democratic Party and Mr. Talabani's Patriotic Union of Kurdistan.¹⁵⁹ In Turkey, the radical Kurdistan Workers' Party (PKK) continues to fight a gorilla war in an effort to secede from Turkey. With more than 10,500 deaths¹⁶⁰ and indiscriminate terrorist attacks in Europe, the PKK has lost a great deal of credibility in the world community.¹⁶¹ Although factionalism and terrorism may weaken the cohesiveness of the Kurds, the fact that leaders are using free elections to determine the opinion of the majority of Kurds regarding independence strengthens their group identity.¹⁶² Furthermore, only a small minority of the

reprinted in *WORLD PRESS REV.*, June, 1991, at 17 (stating that the Kurds have retained their identity for 2,500 years as a subject people).

155. *Kurds*, *supra* note 154, at 38.

156. *Id.*

157. PELLETIERE, *supra* note 148, at 18. Graham E. Fuller, *The Fate of the Kurds*, 72 *FOR. AFF.* 108 (1993) (stating that the Kurds have not yet obtained statehood because (1) it has not been convenient for the international community and (2) the Kurds own factionalism has kept them from fully uniting).

158. See Ayse Sarioglu, *Turkey's Rebel Kurds Go Separate Way From Iraqi Kurds*, The Reuter Library Report, Apr. 29, 1991, available in LEXIS, Nexis Library, Reuter File (discussing the Marxist Kurdish Workers Party (PKK) leader, Abdullah Ocalan, who wants independence for the Kurds); Kurt Schork, *Kurdish Leader Barzani Takes His Autonomy Deal to the People*, The Reuter Library Report, Oct. 18, 1991, available in LEXIS, Nexis Library, Reuter File (contrasting Massoud Barzani, leader of the Kurdish Democratic Party (KDP), who wants to discuss Kurdish autonomy with Iraq, and Jalal Talabani, leader of the Patriotic Union of Kurdistan (PUK), who is less willing to negotiate with Iraq).

159. John Darnton, *Almost a Nation: The Kurds in Iraq — A Special Report; Kurds Rebuilding Shattered Land, Winning a Precarious Autonomy*, *N.Y. TIMES*, Jan. 21, 1994, at A1.

160. See, e.g., *Bloodiest Year for Kurd Separatists*, *FIN. TIMES*, Dec. 22, 1993, at 2 [hereinafter *Bloodiest Year*].

161. See, e.g., Steve Vogel, *Kurdish Separatist Party Outlawed by Germany; Group Blamed for Attacks on Turkish Targets*, *WASH. TIMES*, Nov. 27, 1993, at A22; Steve Crawshaw, *Trial Tests Munich's Policy on Kurds*, *INDEPENDENT*, Apr. 13, 1994, at 9. But see Kevin McKiernan, *Turkey Terrorizes its Kurds: Another U.S. Ally Deploys Death Squads*, 57 *THE PROGRESSIVE* 28 (1993).

162. See *Kurds Want Self-Determination, Not Independence*, Agence France Presse, May 15, 1992, available in LEXIS, Nexis Library, Agence France Presse File [here-

overall Kurdish population engages in terrorist activity¹⁶³ and in response to egregious violations of their fundamental human rights.¹⁶⁴

If a territorial standard is applied to define the group,¹⁶⁵ Kurds would still constitute an identifiable group because they have a common claim to the same territory, known as Kurdistan. Nearly seventeen to twenty million Kurds inhabit the Taurus and Zagros mountains where they have lived for centuries.¹⁶⁶ Therefore, the Kurds are an identifiable group applying any of the three standards — objective, subjective, or territorial.¹⁶⁷

In addition to proving they are an identifiable group, the Kurds must prove that they are suffering some type of substantial grievance in order to claim a right to self-determination. This could be in the form of subjugation, a violation of human rights, or deprivation of a legitimate territorial claim. The Kurds can more than adequately satisfy this criterion, given the numerous atrocities committed against them, including a violation of the international *jus cogens* prohibiting genocide.¹⁶⁸ In the past twenty-two years, more than 200,000 Kurds have been slaughtered in Iraq alone.¹⁶⁹ More than four thousand Kurds were murdered by Saddam Hussein in Halabja in a single cloud of deadly poison gas,¹⁷⁰ while eight thousand men from the Barzani tribe disappeared without a trace.¹⁷¹

In addition to outright genocide, the Kurds have been systemati-

inafter *Self-Determination*).

163. See Tom Hundly, *Rough Road for Mainstream Kurds; War on Minority Makes it Hard to 'Think like a Turk'*, CHI. TRIB., Apr. 18, 1994, at N7.

164. See, e.g., Robert R. Koenig, *Groups Alleging Turkish Hypocrisy in Helping Kurds*, ST. LOUIS POST-DISPATCH, Apr. 15, 1994, at 5C (stating that a recent report by Amnesty International found increasingly widespread, systematic human rights violations targeted primarily at the Kurds in Turkey); Bob Hepburn, *Paper Champions Kurdish Autonomy*, TORONTO STAR, Apr. 17, 1994, at C5 (reporting that at least sixteen employees of a Kurdish newspaper in Turkey have been killed since the paper first appeared in early 1992).

165. See *supra* note 74 and accompanying text.

166. *Kurds*, *supra* note 154, at 38.

167. See MAXIME RODINSON, *Preface to A.R. GHASSEMILOU ET AL., PEOPLE WITHOUT A COUNTRY: THE KURDS AND KURDISTAN 1-7* (Gerard Chaliand ed. & Michael Pallis trans., 1980). "The rights of the Kurdish people should be obvious to everybody. We have here a specifically defined people with a language and a culture all their own . . . living in a geographically coherent area, and refusing *en masse* the cultural assimilation which others seek to impose upon them." *Id.* at 4.

168. See *Convention on the Prevention and Punishment of the Crime of Genocide*, G.A. Res. 96, Dec. 11, 1946, 78 U.N.T.S. 277 (1946). See *Betraying the Kurds Again*, JERUSALEM POST, Apr. 7, 1991, at Op-Ed, available in LEXIS, Nexis Library [hereinafter *Betraying the Kurds*].

169. *Betraying the Kurds*, *supra* note 168, at Op-Ed (statistics from the Committee for the Study of Genocide in Gottingen, Sweden).

170. See *Wretched Kurds*, ECONOMIST, June 24, 1989, at 16 available in LEXIS, Nexis Library, Wire File.

171. *Id.*

cally discriminated against in Turkey and Iraq on the basis of racial, linguistic, and religious differences.¹⁷² In Turkey, Kurds are referred to as "Mountain Turks," denying their existence even in name.¹⁷³ Turkey banned the Kurds from wearing traditional Kurdish clothing and from using the Kurdish language.¹⁷⁴ In addition to violating the basic human rights of the Kurds, Turkey has followed a policy of forcible assimilation.¹⁷⁵ In Iraq, demolition squads leveled entire Kurd villages, leaving hundreds of thousands homeless.¹⁷⁶ This oppression coupled with acts of genocide are more than sufficient to establish a legitimate grievance based on human rights violations. It would be absurd to claim that the Kurds are exercising the rights of citizens, enjoying fundamental human rights, and enhancing their political, cultural, and economic development under such oppressive conditions.¹⁷⁷ The Kurds, an identifiable group suffering a substantial grievance, satisfy the two criteria necessary to establish a right to exercise self-determination and possibly access the extreme remedy of secession.

The Kurds also have a legitimate claim to territory based on an historical grievance.¹⁷⁸ If the Kurds obtain their freedom in the form of an autonomous region within the borders of an existing state — as in the case of Iraqi Kurds — a territorial claim is only useful in defining boundaries. If, however, the Kurds secede and establish an independent Kurdistan, they will need a valid territorial claim, since they will be taking territory from at least one existing state. The Kurds have occupied the same territorial region for four thousand years.¹⁷⁹ The Kurds fought various opponents throughout history but managed

172. See PELLETIERE, *supra* note 148, at 19. See generally MICHAEL M. GUNTER, *THE KURDS IN TURKEY: A POLITICAL DILEMMA* (1990); HUMAN RIGHTS WATCH, *DESTROYING ETHNIC IDENTITY — THE KURDS OF TURKEY* (Updated Sept., 1990) (A Helsinki Watch Report).

173. Andrew Borowiec, *Kurds' Dreams Shatter Again*, WASH. TIMES, Apr. 1, 1991, at A8 (the word "Kurd" was completely banned until recently); *Kurds*, *supra* note 154, at 38. "No where else in the world is a group of people as large as the Kurds deprived not only of national rights, but of their identity as people, different racially and linguistically." *Kurds Existence Denied in Turkey*, TORONTO STAR, Mar. 25, 1994, at A26.

174. *Kurds*, *supra* note 154, at 38.

175. *Turkey's Kurds*, *supra* note 146 at 20.

176. *Unsolved Kurdistan*, ECONOMIST, July 13, 1991, at 44 available in LEXIS, Nexis Library, Wire File.

177. See *supra* notes 91-94 and accompanying text.

178. See *Kurdish Leader Talabani Warns of New "War of Extermination,"* Voice of the People of Kurdistan, Nov. 10 1991, translated by the BBC, Nov. 12, 1991, available in LEXIS, Nexis Library, BBC File. At the time Iraqi Kurdistan was annexed to the newly established Iraqi state in 1924, Britain and Iraq promised to respect the Kurdish people's right to live on their land. The current Iraqi government is now violating these obligations. *Id.*

179. Fay, *supra* note 154, at 17.

to stay on their historic homeland and retain their distinct culture.¹⁸⁰ The Treaty of Sevres (1920) provided for an independent country of Kurdistan but was rejected by the Turkish hero Ataturk.¹⁸¹ The Treaty of Lausanne (1923) replaced the former treaty but failed to include an independent Kurdish nation.¹⁸² Subsequently the Kurds fought the British in Iraq and then the Iraqis themselves, attempting to obtain an independent or autonomous homeland.¹⁸³ In 1946, the Iranian Kurds established an independent republic in Mahabad, but it lasted less than one year.¹⁸⁴ The fact that the Kurds have inhabited the same territory for thousands of years, despite efforts to annihilate or assimilate them, establishes a legitimate claim to the territory. An argument can be made to satisfy the historical grievance requirement of a strict territorial interpretation, since any prior incorporation of Kurd territory was a wrongful acquisition.¹⁸⁵ The current governments in Iraq and Turkey are directly responsible for the continued violation of human rights and denial of Kurd autonomy.¹⁸⁶

Kurd leaders have recently attempted to resolve their desire for freedom with remedies that stop short of outright secession,¹⁸⁷ further legitimatizing their claim in the eyes of the international community.¹⁸⁸ Massoud Barzani, leader of the Kurdish Democratic Party, articulated his goals when he said "now we are looking for autonomy . . . [and] no one can deny us as Kurds our right to self-determination. Just as European peoples have that right, so do we."¹⁸⁹ Peacefully achieving autonomy for Kurdistan and democracy for Iraq are Barzani's expressed political goals.¹⁹⁰ He recognized, however, that the Kurds have the right to be completely free but current realities of the international community limit the Kurds to seeking autonomy.¹⁹¹ The existence of several Kurdish political parties with different plat-

180. See generally *id.*

181. See *Kurds*, *supra* note 154, at 38.

182. See *id.*

183. See Fay, *supra* note 154, at 17 (giving a concise history of the Kurds' territorial struggle).

184. *Kurds*, *supra* note 154, at 38.

185. See *supra* notes 103-07 and accompanying text.

186. See *supra* note 105 and accompanying text describing the dominant parties' wrongful acquisition of territory and the Kurds' right to secession.

187. *Betraying the Kurds*, *supra* note 168 (stating the declared goal of the Kurds is autonomy, not secession); Nick B. Williams, *Kurds - Iraq Begin Peace Negotiations*, L.A. TIMES, Apr. 21, 1991, at A1 (Kurdish Democratic Party leaders do not advocate secession, but rather autonomy). *But see* Sarioglu, *supra* note 158 (stating the PKK leader wants independence, not autonomy).

188. See *supra* notes 95-98 and accompanying text.

189. Schork, *supra* note 158.

190. *Id.*

191. *Iraqi Kurdish Leader Says Elections Important for International Credibility*, Voice of Iraqi Kurdistan, Apr. 13, 1992, translated by BBC, Apr. 15, 1992, available in LEXIS, Nexis Library, BBC File.

forms evidences a functioning democracy. In fact, the Kurds elected a parliament and cabinet to manage Kurdistan's affairs, including the preparation for autonomy under a federal system.¹⁹² This should strengthen the Kurds' claim, rather than weaken it, since it demonstrates political viability and international credibility.¹⁹³

Iraqi Kurds inherited a *de facto* independent state as a result of the power vacuum created after the Gulf War.¹⁹⁴ The U.N. sanctions have provided the Iraqi Kurds protection under a "no-fly zone" from further military attacks by Iraq.¹⁹⁵ The U.N. sanctions, however, also hurt the Iraqi Kurds because the embargo against Iraq, coupled with Iraq's embargo against the Kurds, creates a "double embargo" that prevents desperately needed food and medicine from reaching the Kurds.¹⁹⁶ Leaders of the Iraqi Kurds continue to declare that their goal is a unified federation of Iraq, containing an autonomous Kurdistan.¹⁹⁷ Average Kurdish citizens in Iraq, however, are less diplomatic, voicing their support for an independent Kurdistan.¹⁹⁸ For now, Iraqi Kurds continue to face grave hardships but at least live in an autonomous state under the leadership of their own elected officials, free from discrimination and genocide. Therefore, Iraqi Kurds have obtained, at least for now, an autonomous state in which they exercise political independence. This should be viewed as a positive development under international law. The international community in general, and the U.S. specifically, should not allow further political manipulation of the Iraqi Kurds, but rather support and recognize their autonomy. The U.S. should be willing to allow the Kurds to freely exercise their right of self-determination, which may include full independence through secession if, and when, the Kurds decide that is

192. See, e.g., *Kurdistan Local Government Official on Restructuring Economy, Secession*, Voice of the People of Kurdistan, June 8, 1992, translated by BBC, June 10, 1992, available in LEXIS, Nexis Library, BBC File; *PUK Radio Says Opposition Must Clarify its Stance on Federalism*, Voice of the People of Kurdistan, Sept. 24, 1992, translated by the BBC, Sept. 26, 1992, available in LEXIS, Nexis Library, BBC File. In 1992, Iraq's 4 million Kurds held "their first free and fair elections — internationally observed and perhaps the freest elections ever held in any Arab country." *The Kurds New Democracy*, June 1, 1992, WASH. POST, at A18.

193. *The Kurds' New Democracy*, WASH. POST, June 1, 1992, at A18.

194. See, e.g., James O'Shea, *Kurds Make Democracy Amid Iraq Dictatorship; Neighboring States Fear any Notion of Autonomy*, CHI. TRIB., Mar. 27, 1994, at C1; Scott Steele & Michael Georgy, *Gulf War Orphans; Iraq's Kurds Face Hunger and War this Winter*, MACLEAN'S, Jan. 4, 1993, at 54.

195. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982nd mtg., U.N. Doc. S/RES/688 (1991), reprinted in 30 I.L.M. 858 (1991) [hereinafter S.C. Res. 688].

196. See, e.g., *Kurdistan Trapped Between Twin Embargoes*, NPR SHOW: ALL THINGS CONSIDERED, Feb. 7, 1993, available in LEXIS, Nexis Library, Script File.

197. See, e.g., *Iraq's Kurds; Surviving, with Difficulty*, ECONOMIST, Feb. 6, 1993, at 48; Fuller, *supra* note 157, at n.3.

198. Observers report that while Kurdish leaders espouse the official position of advocating an autonomous Kurdish state within an Iraqi federation, individual Kurds desire full independence. See, e.g., Darnton, *supra* note 159 at, A1.

prudent.

The fact remains, however, that while the Kurds have obtained an autonomous region — if not a *de facto* Kurdistan — in Iraq, they remain subjected to government control in other countries. Even the future autonomy of Iraqi Kurds remains uncertain because it results solely from protection provided by foreign military forces.¹⁹⁹ The radical PKK Party continues to fight a vicious gorilla war in Turkey. Additionally, the PKK openly demands full secession from Turkey. While fighting the Kurds within Turkey, the Turkish Government has expressed a willingness to recognize and even protect Iraqi Kurds from attack. In fact, Turkey remains vehemently opposed to Kurd activities within its borders and continues to violate fundamental human rights including banning Kurd participation in the political process. Although the Kurds in Turkey and Iran have not inherited a *de facto* independent state, they continue to seek independence or autonomy in order to escape from the never ending violations of their fundamental human rights.

The primary difference between the Iraqi Kurds and the Turkish Kurds results from the political environment in which they live. While Iraqi Kurds inherited their own state after the Gulf War, Turkish Kurds have been forced to fight for their very existence against a country with strong ties to Europe and the United States. While Iraqi Kurds were murdered by the arch enemy of the developed world, Turkish Kurds used terrorist tactics in Europe. As perceived by the U.S., Iraqi Kurds are good, innocent victims and Turkish Kurds are bad terrorists. Certainly the PKK Party in Turkey utilizes extreme measures and verges on outright terrorism, while the Iraqi Kurds receive protection from the U.N., thereby directly affecting the credibility of both Kurdish struggles. Regardless, all Kurds deserve the opportunity to exercise their right of self-determination, which may include returning a portion of existing countries to establish an independent Kurdistan.

In order to establish a strong case for an autonomous region or independence, the Kurds must demonstrate political and economic viability.²⁰⁰ The Iraqis themselves have acknowledged the potential economic viability of an independent Kurdistan by not including certain oil-producing towns like Kirkuk in the proposed autonomous region.²⁰¹ The Kurds should not be barred from establishing an autono-

199. The resolve of the United States faces uncertainty in the aftermath of a tragic military accident on April 14, 1994 that killed twenty-six people when two U.S. warplanes shot-down two U.S. helicopters over northern Iraq. See, e.g., *Rethink the Job in Iraq*, INT'L HERALD TRIB., Apr. 18, 1994, at Opinion. But see Caryle Murphy, *It's Important Work*; *U.S. Still Committed to Protecting Kurds*, WASH. POST, Apr. 15, 1994, at A1.

200. See *supra* notes 108-11 and accompanying text.

201. Mouna Naim, *Iraqi Kurdish Leader Pessimistic [sic] on Baghdad Talks*,

mous or independent state, given the relaxed standard of viability set forth in U.N. Resolution 1514²⁰² and the proven success of nations with a much smaller land and resource base. Furthermore, Iraqi Kurds have demonstrated political and economic viability, even under extremely adverse conditions.

The level of disruptiveness is a key element in weighing the benefits of allowing secession²⁰³ with the burdens. This balancing test is the final standard by which to evaluate the Kurds' situation.²⁰⁴ Iraq and Turkey would be hypocritical to claim that the loss of Kurdistan would overly burden them, given the hostile treatment of the Kurds and destruction of their territory. The current level of disruption to the international community is extremely high. In 1991, for example, some 250,000 Kurds became refugees in Turkey, 100,000 in Iran, and another 150,000 were bombed by Iraqi forces while trying to reach the border.²⁰⁵ The repugnant acts of genocide suffered by the Kurds are also disruptive to the international community. Creating an independent Kurdistan would eliminate the refugee problem faced by neighboring countries and the financial burden on the West in funding relief programs. The Kurds would greatly benefit from an independent homeland, where they would at least be free from state sponsored genocide and have their basic human rights protected.

The amount of violence involved in the struggle is a factor in determining overall disruptiveness. In light of the massive force, including chemical weapons, used against the Kurds, their response generally has met the twin criteria of necessity and proportionality.²⁰⁶ However, the Marxist Kurdish Workers Party (PKK), an extremist faction engaged in terrorist attacks, has killed more than 10,500 people since 1984, including civilians.²⁰⁷ This same faction is also the most outspoken proponent of secession, thus negatively affecting the international community's perception of the broader Kurdish struggle. The members of this extremist faction involved in terrorist activities represents a small proportion of the total number of

AGENCE FRANCE PRESSE, Oct. 12, 1991, available in LEXIS, Nexis Library, Agence France Presse File (stating that Kirkuk "could constitute the economic basis for secession").

202. See *supra* note 110 and accompanying text.

203. Although the majority of Kurd leaders are not yet demanding a right to secession, the minority leaders who are may gain influence as secessionist struggles in other countries succeed.

204. See *supra* notes 112-17 and accompanying text.

205. *Betraying the Kurds*, *supra* note 168.

206. Martin Woollacott, *The Tragic Collapse of a Revolution*, GUARDIAN (London), reprinted in WORLD PRESS REV., June 1991, at 16, 17 (the Kurds cannot be blamed for trying to rebel against Iraq); *Wretched Kurds*, *supra* note 170, at 16 (stating that the Kurds may seem troublesome, but they have been continually abused and excluded).

207. *Bloodiest Year*, *supra* note 160, at 2.

Kurds affected by Iraqi and Turkish aggression. Even Turkish leaders who continue to fight the PKK faction have declared that "[i]t is imperative that the international community and the media recognize the clear distinction between the Kurdish issue and international terrorism, of which PKK is a part."²⁰⁸ The massive force used against millions of displaced Kurds, including the annihilation of hundreds of thousands, outweighs the force used by one extremist faction, thus justifying the Kurds' overall use of force.

Other legal and political considerations also lead to the conclusion that the balance is in favor of allowing the Kurds a right to secede. Nonintervention and territorial integrity are hollow principles if they allow a state to systematically exterminate an entire sub-culture of its population. Self-determination outweighs any incompatible principles,²⁰⁹ especially when there is a violation of an established *jus cogens*, i.e. genocide, which is inherently unjustifiable.²¹⁰ The plight of the Kurds is so wretched that intervening in Iraq's affairs is the least risky course available to the West and the one most likely to save lives.²¹¹ In weighing the human rights of individuals against the rights of a state, the enjoyment of all human rights emerges as the fundamental goal.²¹² If the international community plans to actually implement their declared preference for emphasizing human rights over state rights, there is no better opportunity than in the context of the Kurds. The Kurds provide an opportunity for the U.N., U.S., and other nations to recognize the need for structural changes in order to protect fundamental human rights, "even at the cost of inevitable instability."²¹³

VI. APPRAISAL AND RECOMMENDATIONS

The Kurds are certainly entitled to the right of self-determination and would have an extremely strong case for secession. The reluctance of the international community to intervene in an effective manner largely results from states acting solely in their own self-interests. Various countries have manipulated the Kurds in order to maintain a balance of power in the region. The Kurdish Independence movement of the 1960s and 1970s failed largely due to Cold War politics, when both the United States and the Soviet Union had an overriding inter-

208. *PKK Terrorists*, L.A. TIMES, Oct. 24, 1992, at B7 (printing a letter from the Consul General of Turkey).

209. See *supra* note 25 and accompanying text.

210. See THORNBERRY, *supra* note 33, at 57-100 (discussing the prohibition of genocide under international law).

211. *Intervention and Responsibility*, WORLD PRESS REV., June 1991, at 19 (excerpt taken from the ECONOMIST).

212. See *supra* note 141 and accompanying text.

213. Fuller, *supra* note 157.

est in stabilizing the region.²¹⁴ The United States and Iran supported the Kurds as they fought against Iraq, but the only goal was to weaken Iraq, not to give the Kurds independence.²¹⁵ In March of 1975, hostilities between Iran and Iraq terminated and so did military support for the Kurds.²¹⁶ The ultimate aim of the United States in supporting the Kurds was to weaken Iraq, which was an ally of the Soviet Union.²¹⁷

It was a great betrayal which has burned itself into the memory of the Kurdish people; an oppressed minority in all the states where they are dispersed, the Kurds have all too frequently linked their struggles to the realpolitik of the powerful, serving as useful but always dispensable tools in the perennial Middle Eastern game of nations.²¹⁸

Western nations also refused to confront Turkey over its repression of the Kurds, due to Turkey's importance as a NATO ally and secular balance to extremist Muslim factions in the region.²¹⁹ In the recent Gulf War, the United States used the Kurds to destabilize Iraq in order to secure the oil and freedom of Kuwait, but left the Kurds to fend for themselves after Kuwait was liberated.²²⁰ The U.S. position of supporting the unity of Iraq for self-serving political reasons is on record.

We support the unity of Iraq. But there's a very practical reason — not that we think Saddam Hussein should repress the Kurds and the Shiites But there is a political balance of power in the region among states that historically have been at least not friends, or they've been antagonistic If you change the balance significantly, you could induce enormous instabilities.²²¹

This political manipulation of the Kurds has been the rule, not the

214. See PELLETIERE, *supra* note 148, at 23-29.

215. BUCHHEIT, *supra* note 6, at 158. "The United States, Iran and Turkey have always used Iraqi Kurds to harass Iraq's central government, but they have never desired the creation of an independent Kurdish state that would bring about instability in Turkey and Iran." Masoud Kazemzadeh, *How George Bush Lost Iraq*, ST. LOUIS POST-DISPATCH, Aug. 13, 1992, at 3B.

216. BUCHHEIT, *supra* note 6, at 158-59. See David Hirst, *Kurdish Pawns Struggle to Break Regional Stalemate*, Nov. 7, 1992, GUARDIAN, at 10.

217. GERARD CHALIAN, *Introduction to A.R. GHASSEMILOU ET AL., PEOPLE WITHOUT A COUNTRY: THE KURDS AND KURDISTAN 8-17* (Gerard Chaliand ed. & Michael Pallis trans., 1980).

218. David Hirst, *Kurdish Pawns Struggle to Break Regional Stalemate*, GUARDIAN, Nov. 7, 1992, at 10.

219. *Kurdish State; Turn up the Volume to Turkey*, OTTAWA CITIZEN, Nov. 12, 1992, at A12.

220. See generally *Betraying the Kurds*, *supra* note 155.

221. Doyle McManus, *Nations Splitting Up? U.S. Prefers Stability of Current Borders*, L.A. TIMES, July 25, 1991, at A10 (quoting Brent Scowcroft, National Security Advisor to President Bush).

exception, throughout history. Outside powers have been more concerned with keeping Iraqi leaders off balance than providing the Kurds with humanitarian assistance.²²²

The plight of the Kurds, especially after the Gulf War, demonstrates the indifference the international community has shown towards the principle of self-determination when it seemingly conflicts with self-serving political considerations.²²³ Once the United States decided that weakening Iraq was in its own interest, a double standard was created regarding the Kurds: "Those in Iraq are the pitiable, persecuted victims of arch-villain Saddam Hussein, whereas Turkish Kurds are deemed troublemakers and terrorists who need to be controlled."²²⁴ Realpolitik, rather than justice, governs self-determination for violently oppressed groups in the 'new world order' just as it did in the old world order.²²⁵

Any unilateral effort by Turkey or Iraq to improve the situation of their respective Kurdish populations also must be viewed with skepticism. Not only have both countries violated past agreements with the Kurds,²²⁶ but each country has reasons to at least appear accommodating. Turkey must correct its human rights record before being allowed to join the European Union (E.U.).²²⁷ Iraq must improve its image in the international community if it expects to secure any economic or political allies.

Following the Gulf War, the United Nations again looked on helplessly as states alternately intervened and ignored the Kurds as their own self-interests dictated. Without the U.N. willing to take the lead, states were also free to ignore the atrocities, creating an international 'conspiracy of silence.'²²⁸ The other possibility was that states would intervene and promote their own self-interests under the guise of humanitarian intervention.²²⁹ The intervention of the United States and other Western nations on behalf of the Kurds after the Gulf War was certainly necessary, but it was nonetheless disconcerting for the inter-

222. Joost R. Hiltman, *Still Pawns in the Great Game: Iraqi Kurds*, 254 THE NATION 620 (1992).

223. Craig R. Whitney, *The World: When Empires Fall Not Everyone Emerges with a State of His Own*, N.Y. TIMES, Apr. 14, 1991, § 4, at 2.

224. *Turkey's Kurds*, *supra* note 146, at 20.

225. *Id.*

226. See, e.g., Nick B. Williams Jr., *Kurds - Iraq Begin Peace Negotiations*, L.A. TIMES, Apr. 21, 1991, at A1 (discussing a 1970 deal between Iraq and the Kurds that would give them full autonomy of their territory).

227. See, e.g., Martin Bright, *Turkey: Looking Towards Europe; Before Joining the EU, Turkey has to Overcome Twin Hurdles of Rampant Inflation and a Poor Human Rights Record*, GUARDIAN, Apr. 11, 1994, at E11.

228. See Marc Weller, *Threat to Peace Allows World Body to Override Charter*, TIMES (London), Apr. 6, 1991, at Overseas News, available in LEXIS, Nexis Library, Wire File.

229. *Id.*

national community. "The presence of the coalition forces on Iraqi territory due to the revolts of the Kurdish people is unjustifiable. The coalition should hand over policy regarding the Kurdish people to the UN, which has no territorial ambition."²³⁰ The U.N. is the only institution capable of intervening on behalf of an oppressed people, without the appearance of acting out of political self-interest.

After initial inaction, however, the U.N. Security Council took a significant step by passing Resolution 688, which expressly condemns Iraq's severe repression of the Kurds.²³¹ Although the U.N. Charter prohibits interference in matters essentially within the domestic jurisdiction of a member state, a situation threatening international peace and security authorizes the Security Council to act.²³² The U.N. Secretary General also may take any matter to the Security Council that threatens the maintenance of international peace and security.²³³ The United Nations has recognized that state sponsored genocide, the use of chemical weapons, the mass migration of displaced refugees, and violations of human rights constitute a threat to international peace; and more importantly, the U.N. finally has acted.

The Kurds in Iraq demonstrate that they are capable of functioning as an independent state, even under harsh circumstances. Given the degree of oppression and discrimination against the Kurds in Turkey, Iran, and Iraq, the international community should at least support the Kurds efforts to obtain an autonomous state in each of these countries. Of course, the decision should be left to the Kurds as to whether they want a fully independent Kurdistan. But if the Kurds do opt for secession, the international community, under the leadership of the U.N., should evaluate their claim by applying criteria, such as those suggested above, and should not allow countries to manipulate the Kurds in order to further their own objectives. The time has come for the international community to recognize secession as a legitimate possibility under self-determination and to stabilize international relations through active U.N. involvement.

VII. CONCLUSION

Self-determination has become customary international law, thus applicable to all nations. It also has emerged as an overriding principle when in conflict with other principles of international law. Self-determination has not, however, obtained the status of *jus cogens*, primarily because it applies only to groups, not universally.

230. *Intervention and Responsibility*, *supra* note 192, at 19 (excerpt and quote taken from the Indonesian periodical SERAMBI INDONESIA).

231. S.C. Res. 688, *supra* note 195.

232. U.N. CHARTER art. 39.

233. U.N. CHARTER art. 99.

Only an impartial institution representing the entire international community can regulate claims of self-determination and secession. Any type of state involvement, other than perhaps formal recognition, risks appearing as a cloak for implementing a political agenda. States will continue to act in their own self-interest, not to protect human rights. Rather than allowing states to unilaterally determine the validity of claims of self-determination and secession, standards and criteria must be formulated and consistently applied by the United Nations.

In order to claim a right to self-determination there must be (1) an identifiable group, determined by applying objective, subjective, and territorial standards; and (2) a substantial grievance in the form of subjugation, a violation of fundamental human rights, or territorial deprivation. Although defining group identity and what constitutes a substantial grievance are subject to interpretation, so are many other accepted legal standards (i.e. reasonableness).

After establishing a right to self-determination, additional criteria must be satisfied before a legitimate right to secede exists. These criteria require that (1) less extreme remedies be exhausted; (2) the leaders of the group represent the majority and account for opposing views; (3) the group demonstrate some level of political and economic viability; (4) a valid territorial claim exist if the group is seceding from an existing state, but not in a colonial context or if the seceding group joins an existing nation; (5) the use of force be necessary and proportionate; and (6) the overall benefits of allowing secession outweigh the burdens. The ultimate goal is to maximize world harmony by striking a balance between individual human rights and state rights. The threshold question becomes whether the benefit to the seceding group and international community outweighs the burden to the dominant state and international community. If the answer is yes, the secessionist claim is legitimate.

In applying these standards and criteria to the Kurds, it is apparent that they have satisfied the requirements for claiming a right to self-determination and have an extremely strong claim for secession. The Kurds are an identifiable people with a distinct culture and language who have lived in the same territorial region for thousands of years. They have suffered such atrocities as state sponsored genocide, cultural extermination, and gross violations of fundamental human rights. To say that the Kurds have a substantial grievance is a ridiculous understatement.

The Kurds are still attempting to achieve their goal of freedom through methods short of secession. Their leaders are willing to poll the opinion of the group before acting and advocate remedies short of outright secession. Although there is some factionalism amongst the Kurdish leadership, this is a healthy foundation for a politically viable democracy. The Kurds are also capable of economic viability, especially if they obtain their legitimate territorial claim that includes rich oil-

producing regions. The Kurds do not need a territorial claim in order to achieve autonomy, except as an aid in defining the borders. Regardless, the Kurds do have a legitimate claim to the territory they have inhabited for centuries. International agreements, including the Treaty of Sevres, have recognized the Kurds' territorial claim. The Kurds use of force has been both necessary and proportionate. In addition to potential factionalism, the use of terrorist tactics by the Kurds is a weakness in their claim. However, it is remarkable that a people faced with genocidal extermination has not resorted to all-out warfare or unrestricted terrorism in order to preserve their race. Finally, the disruptiveness of allowing a people to be exterminated, oppressed, and forced out of their own territory outweighs the disruptiveness of allowing them an autonomous or independent state. The benefit of allowing millions of people to live without the constant fear of complete annihilation surely outweighs the burden to Iraq and Turkey of losing people and territory that they treat with total disregard.

Individuals create states in order to protect their fundamental rights, therefore it makes sense to continue promoting human rights over state rights when they are incompatible. Rather than viewing secessionist struggles as a dangerous step towards anarchy, they should be viewed as a natural process of allowing groups of individuals who were forced into political units against their will to freely exercise their right of self-determination. It is probably more than coincidental that as secessionist claims increase, creating smaller nation-states, so does the number of large international organizations like the European Union. Perhaps these two seemingly incompatible trends are actually a preview of the future world order, where regional multinational organizations interact in a true international community. To prohibit all secessionist claims would be to stifle the positive development of human rights and the continual evolution of a viable world order.

