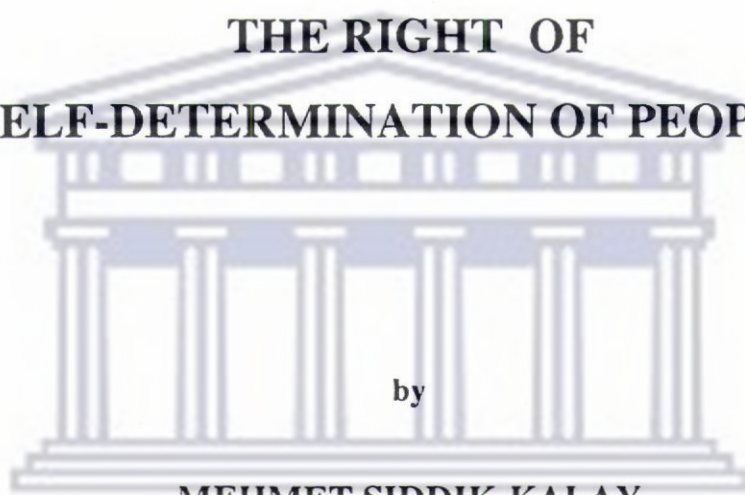


**KURDS, KURDISTAN AND THE CLAIM OF
THE RIGHT OF
SELF-DETERMINATION OF PEOPLES**



by

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**presented in fulfilment of the requirements for the degree Magister Legum in the
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DECLARATION

I declare that *Kurds, Kurdistan and the Claim of the Right of Self-Determination of Peoples* is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

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LIST OF CONTENTS

1.	Introduction	1
2.	Kurds and Kurdistan	4
2.1	Introduction	4
2.2	The Kurdish Language	5
2.3	Religion	6
2.4	Population	6
2.5	Historical Background of the Kurdish People	7
2.5.1	Origin of the Kurds	7
2.5.2	Imperialist Struggle in the Middle-East and Kurdistan	11
2.5.3	Division of Kurdistan	16
2.6	Current Situation in Kurdistan	20
2.7	The Influence of the Kurdish Problem on the Politics of the Sovereign States in the Region	21
2.8	The Struggle of the Kurdish People against the Colonialist States	23
2.8.1	Turkey	25
2.8.2	Iraq	28
2.8.3	Syria	32
2.8.4	Iran	33
	2.8.4.1 The Kurdish Republic of Mahabad	34
2.8.5	Soviet Union	36

3.	The Development and Origins of the Right of Self-Determination	38
3.1	Introduction	38
3.2	The French Revolution and Self-Determination	42
3.3	Socialist Ideas and Self-Determination	44
3.4	The Liberal Ideas and Self-Determination	48
3.5	The Concept of Self-Determination between the Two World Wars	53
3.6	The Second World War and the Concept of Self-Determination	54
4.	The Development and Status of the Concept of Self-Determination in Modern International Law	57
4.1	Developments within the realm of the United Nations	57
4.2	Developments at Regional International Level	65
4.2.1	The Helsinki Declaration	65
4.2.2	Organisation of African Unity	67
4.3	Developments at Transnational Level	68
4.3.1	The Algiers Declaration of the Rights of Peoples	68
4.4	Concluding Remarks	72
5.	Claimants of the Right of Self-Determination	74
5.1	The Concept of People	74

5.2	What can be determined by the self?	88
5.3	Decolonisation era	90
5.4	Secession	96
5.5	The Claimants of the Right of Self-Determination and Kurds	108
5.5.1	Palestine	108
5.5.2	Kurds	112
6.	Conclusion	131
7.	Appendix A	136
8.	Bibliography	137



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1. INTRODUCTION

Since the French Revolution, the concept of self-determination has been intertwined with international political discourse. Conflicting interpretations of the concept of self-determination have given rise to much international conflict and bloody wars have been fought in pursuit of the exercise of self-determination. It has been said that:

‘[t]he term self-determination is used more frequently and with more passion than any other term in contemporary international relations ... it has also the distinction of being one of the most confused expressions in international relations.’¹

The concept of the self-determination of peoples have shaped many state borders in our modern day world and its application is expected to effect even further changes to state borders, political structures within states as well as political relations between different states in future.

In what follows, the historical development of the concept of self-determination as well as its development in modern international law will be examined. It is submitted that a clear understanding of the concept of the right of self-determination of peoples firstly requires an analysis of each of the constituent elements, such as: What is a right? Who is the self? Who determines the criteria for the purpose of establishing who is the ‘self’? What is to be determined?

It is further submitted that, apart from the purely semantic and syntactical dimension involved in the interpretation of the concept of the self-determination, there is the added problem of the highly political content of the concept. Due to different ideological and economical conflicts between the different actors in the international community and between scholars of different political persuasions, various meanings have been attributed

¹ W. Ofuatye-Kodjoe as quoted in B. Neuberger *National Self-Determination in Postcolonial Africa* (Colorado: Lynne Rienner Publishers Inc., 1986)

to the concept of self-determination. These differing interpretations of the concept of self-determination will be examined as well as the impact thereof on the development of the concept in modern international law.

The status of the concept of self-determination in modern international law will also be analysed with specific reference to the following: whether it could be said that that the concept of self-determination has evolved from a *principle* to a *right* in international law, the criteria to be satisfied entitling one to exercise the right of self determination as well as the scope of application of the concept of self-determination.

The examination of the concept of self-determination will be done primarily with the aim of evaluating its applicability within the Kurdish realm as it is the aim of this thesis to investigate whether the Kurds' aspirations for the establishment of an independent Kurdistan have any basis or justification in international law.

The Kurds are Indo-Europeans whose origins trace back to the Medes of antiquity. Together with the Arabs, the Persians and the Turks, the Kurds constitute one of the four major peoples of the Near East. Presently numbering more than 30 million people, they are a distinct ethnic group, with their own language, culture and identity. They are the largest ethnic group in the world without their own state.

For more than 4 000 years the Kurds have occupied the sweep of mountains and foothills north-east of Mesopotamia. Their homeland, Kurdistan ('the land of the Kurds'), stretches from the Taurus mountains in the west to the Iranian plateau in the east and from Mount Ararat in the north to the plains of Mesopotamia in the south. As such it comprises important parts of Turkey, Iran, Iraq and Syria. It covers an area of approximately 500 000 square kilometres - an area as large as France.

The land comprising Kurdistan not only contains one of the richest oil deposits in the world; it is also the watershed of the Tigris and Euphrates rivers, which provide water to

Turkey, Syria, Iran and Iraq. The economical significance of the area coupled with the fact that it forms the meeting point of Turkey, Iran, Iraq and Syria has made it an obvious battleground for the various neighbouring states and this, in turn, has had a severe impact on the Kurdish aspiration for independent statehood. From 1923 onward, Kurdistan has been divided between the five surrounding countries, i.e. Turkey, Iraq, Iran, Syria and the former USSR, in a series of treaties which ensured that the Kurds would be a perpetual minority group in all of these countries and hence impotent in the face of democracy.

This thesis will examine the history of the Kurdish people in Turkey, Iran, Iraq, Syria and the former USSR. In particular, the political and economical factors which gave rise to the division of Kurdistan will be examined. The thesis will also focus on nations which have waged similar struggles in their quest for self-determination, such as Palestine and the states comprising the former Yugoslavia. In view of the fact that these peoples have waged struggles which are in many senses similar to the Kurdish quest for self-determination, it is submitted that this approach would be instructive in demonstrating the practical application of the international law relating to self-determination. In particular, the aim of this approach is to illustrate the discrepancies in the application of the laws relating to self-determination to different peoples by the international community. The reasons for these discrepancies will also be analysed with reference to the Kurdish realm. It is submitted that this approach is necessary for the purpose of fully understanding the Kurds' aspiration for independent statehood and evaluating whether their claims are justified in the context of modern international law.

2. KURDS AND KURDISTAN

2.1 INTRODUCTION

Kurds have inhabited the region Northeast of Mesopotamia since ancient times. This area, known as Kurdistan, was arbitrarily partitioned by the Western powers after the First World War and carved into four pieces which were respectively allocated to Iran, Iraq, Syria and Turkey. Another small piece was incorporated into the former Soviet Union. Although we do not know when or by whom the name Kurdistan was first used, we do know that in the 12th century, during the reign of the Seljuk's Sultan Sanjar, the name was used to describe the area that comprises Hemedan, Dinavar and the Kermanshahan provinces, east of the Zagros mountain chains, and in the west, Sherizor and Sinjar provinces. Previously the Arabs called this area Jibal-ul Jazire or Diyar-i-Bekr. In Arabic literature the name Kurdistan first appears during the 14th century.² The name Kurdistan does not appear in modern atlases, but in some older atlases describing physical geography this name will appear in the area of upper Mesopotamia. Kurdistan, in its broadest or ethnographic sense, means the region inhabited by the Kurds or 'an area in the Middle-East inhabited by the Kurds...'³

According to Bazil Nikitin, 'If one wants to describe the country that Kurds inhabit, one cannot use the term Kurdistan, because it is a nominal and changeable term which is determined by conditions of time and place'.⁴ The social anthropologist Van Bruinessen shares this idea, saying 'There has never been a state of that name'. For social, geographical and political reasons this name has been used to describe only a part of the total area inhabited by the Kurds. During the Ottoman Empire the name Kurdistan was used for the province of Diyarbakir

² B. Nikitin *KÜRTLER: Sosyolojik Ve Tarihi Inceleme* (Istanbul: Özgürlük Yolu Yayinlari, 1986) at 56

³ *Encyclopedia Britannica Vol 13* (London: William Benton, 1959) at 520

⁴ B. Nikitin, *supra* note 2 at 58

which refers only to a part of the entire territory inhabited by Kurds. Similarly Iran uses the name of 'Kordestan' for a province which comprises approximately a third of the area where Kurds constitute a majority of the population.⁵

Kurds have lived on this land that is ethnically called Kurdistan for many thousands of years, but never established a state called Kurdistan comprising the territory they inhabit. Most of the Kurdish states, empires or dynasties have been established on a part of the Kurdish land or named after the founder or his clans or the name of the local region. On the other hand there are many large Kurdish enclaves outside of these Kurdish states.⁶

Today the concept of Kurdistan, apart from the Kurdish enclaves, comprises the following ethnical boundaries: from the north stretching from Mount Ararat to the plains of Mesopotamia; from the west stretching from the Taurus Mountains to the Iranian Plateau, the eastern Taurus and the Zagros chain forming the backbone, stretching roughly from the north-west to the south-east.⁷

2.2 THE KURDISH LANGUAGE

Kurdish is an Indo-European language and it belongs to the north-western group of Iranian languages. It is very different from its neighbouring Turkish Altaic and Semitic Arabic. There are a number of Kurdish dialects, the two most widely spoken being Kurmanji and Sorani. Kurmanji is mainly spoken in the North and north-west of Kurdistan, Sorani is mainly spoken in Southern Kurdistan.

⁵ M. Van Bruinessen *Agha, Shaikh and State: The Social and Political Structures of Kurdistan* (London: Zed Books Ltd, 1992) at 11

⁶ M. Van Bruinessen, *supra* note 5 at 11

⁷ S. Laizer *Into Kurdistan: Frontiers under Fire* (London: Zed Books Ltd, 1991) at 1; *Encyclopedia Britannica*, *supra* note 3 at 520; Kurdish Institute at Brussels *The Kurdistan File* (Brussels: Kurdish Foundation - Free University Brussels, 1989) at 7

2.3 RELIGION

The ancient Kurdish religion was Zoroastrian. Today most of the Kurds are Sunni Muslims and follow the Shafi'i school. In the southern part of Kurdistan there are a few Kurdish tribes who are Shi'ite, and in the north-west of Kurdistan there is a small Alawite (Shi'ite section) Kurdish group. There is a Kurdish Yezidi group, which is a mixture of Zoroastrianism and Islamic religions and there are also a few Christian and Jewish Kurds.⁸ Although the Kurds are not united by a common religion, this does not affect their political alliances.

2.4 POPULATION

Because the Kurdish identity is not acknowledged by the sovereign states for various political reasons, the Kurdish population has not been included as a separate entity during the census counts or only a narrow fraction has been counted. For example '...the 1955 census in Turkey found 1.5 million Kurdish speakers among a total of 24 million inhabitants which was less than half the number of Kurds then living in Turkey. The statistics published there later made no mention of Kurds at all.'⁹ If one also takes into account that after Sheikh Said's revolt, in 1926-27, about 1 million Kurds were sent into exile to western Anatolia by Ataturk¹⁰ the above figure shows even less than half of the population. Similarly, in Iran, the census of 1956 did not count Kurds as a separate entity. For this reason, estimates of the total Kurdish population vary widely and have been generally underestimated.

After the Gulf War, much attention was focused on this area and further estimates were made about the Kurdish population. Both the *National Geographic* and

⁸ M. Van Bruinessen, *supra* note 5 at 23

⁹ M. Van Bruinessen, *supra* note 5 at 14

¹⁰ B. Nikitin, *supra* note 4 at 80

Laizer estimated the number of Kurds at 25 million during 1992, whilst Beyer gives the following estimates:¹¹

Region	Kurdish Population	Percentage of country population as whole
Turkey	14.5 million	25
Iraq	4.9 million	26
Iran	6.7 million	12
Syria	1.4 million	11
U.S.S.R	0.4 million	less than 1
TOTAL	27.9 Million	

Besides the Kurds living in Kurdistan, if one adds the Kurdish population in Kurdish enclaves out of Kurdistan and immigrant Kurds in Europe, the total Kurdish population is estimated at between 25-30 million.¹²

2.5 HISTORICAL BACKGROUND OF THE KURDISH PEOPLE

2.5.1 ORIGIN OF THE KURDS

Many ethnologists agree that the Kurdish people are a mixture of the Median branch of the Aryans, who came from the north and settled to the east and south of the Caspian Sea and gradually spread southwards.¹³ The first branches of the

¹¹ C. Hitchens 'Struggle of the Kurds' (1992) Vol 182 No 2 *National Geographic* 32 at 36; L. Beyer 'Getting Their Way' *Time* (1 April 1991) 12 at 13

¹² B. Nikitin, *supra* note 2 at 85-87; *The Kurdistan File*, *supra* note 7 at 8; M. Van Bruinessen, *supra* note 5 at 15; I. Besikci *Selected Writings: Kurdistan & Turkish Colonialism* (London, Blackrose Press, 1991) at 2

¹³ H. Arfa *The Kurds: An Historical and Political Study* (London: Oxford University Press, 1966) at 1

Medes who immigrated south established the kingdoms of the Lullubians, Guties, Hurrians, Kassites, Karduni, Urartians and Manni.¹⁴

In a Sumerian inscription of B.C. 2000, a country known as Kardaka is mentioned.¹⁵ This was later called Kùrtie by the Assyrians and encompassed the region of the middle Tigris from the district of Bohtan near Mount Judi across Bazabda to the mountains of Khoi-Shengar in the west and the chains of Zagros in the East.¹⁶ Xenophon in 400 BC writes of the Kardukai as a mountain people who obstructed his expedition towards the sea.¹⁷

In the 7th century Arabs used the collective name 'Akrad', which is the plural term for Kurd,¹⁸ to describe these people. They were later called Kardu by the Assyrians, Cortukh by the Armenians and in the Greek and Roman classics referred to as the Carduchi, Gordse and Cyrti. Some of the great Kurdish tribes can be identified as existing as early as the 6th century B.C and living the same sort of life as they do today, like Bokhtis (Bohti), the Mukris, the Hadabanis, the Mihranis, the Babans and others recognisable from the records of Sargon II, Assarhada of Assyria, Herodotus, Moses of Chrone (Armenia).¹⁹

The best known ancestors of the Kurds are the Medes who lived with the Persians east of Lake Urmiah (B.C 900). After the Persians moved to the south, the Medes took control of the whole area. The name of the Medes first appeared in Assyrian records in 858-824 B.C.²⁰ They vanquished the Assyrian empire and caused the fall of the great city of Niniveh in 612 B.C but were later defeated by the Persians under King Cyrus in 550 B.C. Indeed, the Kurdish calendar dates

¹⁴ Torî *Dîroka Kurda* (Leuven: Wesanên Aza, 1988) at 1

¹⁵ H. Arfa, *supra* note 13 at 3

¹⁶ *Encyclopedia Britannica*, *supra* note 3 at 520

¹⁷ E.V. Rieu *Xenophon: The Persian Expedition* (Harmondsworth: Penguin Books, 1949) at 132

¹⁸ E. O'Ballance *The Kurdish Revolt 1961 - 1970* (London: Faber and Faber Limited, 1973) at 15

¹⁹ *Encyclopedia Britannica*, *supra* note 3 at 521

²⁰ Torî *supra* note 14 at 1

from the defeat of the Assyrians by the Medes and the Kurdish New Year continues to be celebrated on the anniversary of this defeat.

After their defeat at the hands of the Persians, the Kurds lived in what was known as the Med-Persian Empire which existed until the Macedonian occupation of 330 BC.²¹ After the death of King Alexander of Macedonia, the Seleucids tried to dominate the Kurds, but most of the Kurdish tribes continued their independent life.²²

The Kurds then were caught up in continuous wars between the Parthians and Sassanians and the Romans and Byzantines which were fought on Kurdish land until the Arab-Islamic Occupation. After the Arab-Islam invasions, Kurdistan became a war-arena between the Arabs and Persians and the Arab and Byzantine armies.²³ Because of the Kurdish resistance against the Arab invasion, and the clinging to their old religion of Zoroastrianism, genocide was committed against them and much of their belongings were taken as spoils.²⁴

Although the Kurds acknowledged the Kalifates at times, they continued their independent life style and during this period there was an increase in the number of independent Kurdish States and dynasties.²⁵ Some of these are:

Kurdish Ziyar Kingdom (930-1077)

Kurdish Alamud Kingdom (1077 - 1256, ended by Mongolian)

Kingdom of Shahrizor (11th to 16th century)

The Hassanwaihides (959-1015) to the south

Merwanides (990-1096) to the west with their capital at Diyarbakir

²¹ Torf *supra* note 14 at 122

²² *Encyclopedia Britannica*, *supra* note 3 at 521; Torf *supra* note 14 at 125

²³ A. Poladyan VII. - X. *Yüzyillarda Kürtler* (Ankara: Öz-Ge Yayinlari, 1991) at 18

²⁴ A. Poladyan *supra* note 23 at 22; E.Xemgin *Islamiyetten Osmanlilara Kadar Kürdistan Tarihi Cilt II* (Köln: Agri Verlag, 1992) at 22

²⁵ H. Arfa, *supra* note 13 at 7

Cheddadites (951-1164, ended by Seljuks) to the north

Buweyhs (934-1055, ended by Seljuks)

The Gor Kingdom (1148-1215)

During the period 1169-1250 the Kurdish Abbuyid dynasty reigned over the whole Muslim middle-east with Saladin as its most illustrious representative. This dynasty illustrates the significance of Kurdish power in the early Middle Ages in the Muslim world. After a tidal wave of Mongol invasions, the Kurds then came under the influence of the Ottomans and Persians with a boundary between these two powers running through Kurdistan. For political reasons the Safavi dynasty in Iran enforced the Shia form of Islam on the Iranian nation while the Yavuz Sultan Selim I (the Grim) decided to extend the frontiers of his Ottoman empire in the east and south, using the Sunni form of Islam. Because most of the Kurds were Sunni, they felt more sympathy for the Sunni Turks and sided with them in further Perso-Ottoman battles.²⁶ After the Ottoman victory at the battle of Tchaldiran in 1514, in which the Kurdish chieftains fought on the side of the victors, the political situation in Kurdistan underwent a complete change which would become the basis of modern Kurdish history.

After this battle, a pact between Kurds and Ottomans formally recognised sixteen independent principalities, about fifty Kurdish sanjaks (fiefdoms) and a number of Ottoman sanjaks. They were not accountable to the Sultan nor did they have to pay him tribute. They were, however, bound not to rise against the Port and not to modify the frontiers of their state. This was supposedly to protect the rights of adjoining principalities, but in actual fact it was meant to prevent the emergence of a centralised state of Kurdistan.²⁷ In Iran the political situation of the Kurds was similar to that of the Kurds in the Ottoman Empire.²⁸

²⁶ H. Arfa, *supra* note 13 at 15

²⁷ G. Chaliand (Ed) *People Without a Country: The Kurds and Kurdistan* (London: Zed Press, 1980) at 32

²⁸ Halfin XIX. *Yüzyilda Kürdistan Üzerinde Mücadeleler* (Istanbul: Komal, 1992) at 19

2.5.2 IMPERIALIST STRUGGLE IN THE MIDDLE-EAST AND KURDISTAN

At the end of the 18th Century the Ottoman Empire was weakened because of its wars with Russia, attacks by Iran from the east and harassment by Austria from the west. By the 19th century the weakened Ottomans had also failed to adapt to the Industrial Revolution and had lost their influence in Europe. This led to the Ottoman Empire's 'World Empire' ideology being replaced by an 'Islam-Omma' ideology in which they concentrated their sphere of interest on the Middle-East. But the more effective and powerful economic and political activity of British and French colonialism in the Middle-East, and their relation with the feudal Arabian chieftains, prevented the influence of the new Ottoman strategy. Because of all these changes, the political strategy of the Sublime Porte (Ottoman Palace) with the Kurds changed too.

The Sublime Porte, which had ambiguous relations with the Kurdish principalities since the time of Sultan Selim The Grim, continuously infringed the rights of the Kurds to centralise its threatened and decadent Empire. It saw Kurdistan as an untapped source of manpower and accordingly used its men not only to bolster the Ottoman troops but also to fill its coffers by the imposition of heavy taxes.²⁹ The weakened position of the Ottoman Empire also renewed the interest of Iran in the Kurdish lands in eastern Turkey.

Western penetration in the form of missions, consulates and schools had also begun to manifest itself as early as 1835.³⁰ In this way not only neighbouring imperialist powers but also external powers became involved in Kurdistan.

²⁹ G. Chaliand, *supra* note 27 at 25

³⁰ G. Chaliand, *supra* note 27 at 25

In 1806 the British established a branch of the East India Company in Baghdad and could now do better research on Kurdistan's strategic position, which had interested them earlier. Mediators of the company, representatives and groups of archaeologists, diplomats and others were sent to the area to develop friendly relations with the princes and tribal chiefs and also to research the roads and general conditions. Both Britain and France recognised the strategic significance of the region and sought to curry favour with the Persian and Ottoman rulers. The Kurds were used as a trump card against the weakened Ottoman Empire and Persia and ultimately Britain gained control of the region from Trebizond (Trabzon, Black Sea coast) through to the Persian Gulf and India which opened up new markets and resources for itself.

Because of the continuous Turkish-Russian, Turkish-Persian and Persian-Russian wars on Kurdish land, the centralisation policy of the Ottomans and the awakening of Kurdish national awareness, some fifty uprisings took place in Kurdistan between 1804 and 1878. Although some of these uprisings started as reactions to the wars on their lands, infringement of their privileges, very high tributes and taxes, most of this unceasing warfare waged against the Turks and Iran was to maintain independence. The most famous of these was the Baban Revolt of 1806, which was defeated by Ottoman armies towards the end of 1808. This was followed in 1815 by uprisings in the Erzurum and Van regions and there was another wave of spontaneous local rebellions during the 1828-29 Russian-Turkish war.³¹

After the Baban uprising, Mir (Prince) Mohammed, a descendant of the famous Saladin, sovereign of the principality of Soran, which lies between the Great Zap and the Iranian frontier, wanted to unite all the Kurdish chieftains and establish an independent Kurdistan. He took advantage of the weakened Ottoman Empire after their recent war with Russia and contended with the troops of Mehmet Ali,

³¹ G. Chaliand, *supra* note 27 at 28

Viceroy of Egypt. In May 1833 he brought southern Kurdistan under his control, and in 1835 he extended this control to Iranian Kurdistan. Everywhere he was greeted as a liberator by the Kurdish population which prompted Persia to call upon its 'protector' Russia, to provide assistance.

The Sublime Porte invoked religion, calling on the Mir to stop the war and to seek 'reconciliation amongst Muslims'. Some of the Kurdish religious leaders were affected by these appeals and pronounced a 'fatwa' (religious decree) which was binding upon all the faithful: 'He who fights against the troops of the Khalif [Ottoman Sultans were Khalif at the same time] is an infidel'.³² Owing to numerous Ottoman and Persian attacks and the influence of the 'fatwas' he was deserted by his own people and had to surrender in 1837.

At this time, because of the rivalry over Iran and the Ottoman Empire, relations between Britain and Russia were tense. The British even offered to fight against Russia on the side of the Ottomans during the 1828 Russo-Ottoman war.³³ After Mir Mohammed's revolt, Bedir Khan of Bohtan's revolt broke out. His family had been rulers of the Bohtan principality since the 14th Century. He also tried to set up a united and independent Kurdistan and by 1840 he had extended his influence over all of the Ottoman Kurdistan. Beside the Kurds, he got support from the Armenians, Assyrians, Chaldean and other Christians living in Kurdistan. The war raged until 1847. The Ottomans again used the rivalry between the feudal Kurds and managed to convince Bedir Khans' nephew, Yezdan Sher, who commanded the eastern flank of the Kurdish forces, to go over to the Ottoman side. In the meantime, acting at the request of the Ottoman authorities, British and American missionaries in Kurdistan had set about turning the Christian tribes against the Kurdish leader.³⁴ Although he finally surrendered, the struggle for an independent Kurdistan did not stop. In fact, in the Russo-Ottoman war of Crimea in 1853-55,

³² G. Chaliand, *supra* note 27 at 28

³³ Halfin, *supra* note 28 at 32

³⁴ G. Chaliand, *supra* note 27 at 30

although the Sultan had pronounced it a jihad (holy war) most of the Kurds refused to take part. And they, under the leadership of Yezdan Sher (who had sided with the Ottomans against his uncle) rose up again. In a short time he managed to take control of the area from Baghdad to Lake Van and Diyarbakir.³⁵ During this war Russia tried to bring the Kurds to their side, promising them autonomy.³⁶ Britain and France were allies of the Ottoman during the war with Iran and the Ottoman Empire being totally under British control. It was for this reason that British diplomats signed the agreement with Russia as the Ottoman's representative.³⁷ Naturally these allies would not welcome the emergence of an independent Kurdistan which might fall under Russian influence. They played the role of mediator between the Kurdish leader and Ottomans, and managed to persuade Yezdan Sher to settle the question of independence through Kurdish and Ottoman negotiations with the British as mediators. Under British sponsorship he arrived in Istanbul for negotiations, but as soon as he had arrived he was imprisoned.³⁸

After the Russian and Ottoman agreement the British hoped to build the railway which would join Britain with India and pass through Anatolia, Syria, Kurdistan and Iran. But this plan did not materialise because of opposition from Napoleon who wanted control of Syria.³⁹

The last important Kurdish revolt of the 19th Century broke out in 1880 under the leadership of Sheikh Obeidullah who invaded and occupied Iranian Kurdistan. Sheikh Obeidullah's announcement for a united and independent Kurdistan caused panic in the Ottoman Port. After co-operation between the Ottoman and Iranian army, this revolt was also crushed.⁴⁰

³⁵ G. Chaliand, *supra* note 27 at 30

³⁶ H. Arfa, *supra* note 13 at 23

³⁷ Halfin, *supra* note 28 at 62

³⁸ Halfin, *supra* note 28 at 60

³⁹ Halfin, *supra* note 28 at 63

⁴⁰ Halfin, *supra* note 28 at 92

After this last revolt, the approach of the Ottoman dynasty changed toward the Kurdish ruling classes. Ottoman Sultan Abdulhamid II (The Red Sultan) hoped to integrate the Kurdish leaders into the system by allowing them to share in the power and he encouraged more amicable relations.⁴¹ One of the most important reasons that forced the Porte to change his political strategy towards the Kurds was the development of political sympathy with Russia.⁴² The Porte also used Pan Islamic appeal very successfully. In 1891 Sultan Abdulhamid II organized an irregular Kurdish cavalry unit known as the Hamidiye Regiments, similar to the Russian Cossacks.⁴³ The commanding officers were appointed from among the petty chieftains, the commanders of the divisions and regiments being the more important chiefs of tribes. In this way he managed to control the restless Kurds and create a moral link between himself and the Kurds.⁴⁴ After the Young Turks's revolution against Sultan Abdulhamid in 1908-9, the name of the Hamidiye was changed to Ashiret Alaylari (Tribal Regiments). These regiments played a very important role in the Porte's political life as they were used for suppressing the national movements of the various peoples struggling against Ottoman rule, such as the Armenians, the Arabs, Albanians and even the Kurds themselves. They were also used to protect the eastern frontiers of the Empire and to help in the centralization of the Empire.

At the end of the 19th Century as a result of the Ottomans using Kurds against Russia, supposedly to protect the Islam Khalifet, and Russia using Armenia in the name of Christianity and the hope of independence, there were armed clashes between the Armenians and the Kurds who had lived together in peace for hundreds of years. This religious conflict encouraged Kurdish loyalty to the Turkish Government during the First World War. This call for an Islamic holy war

⁴¹ G. Chaliand, *supra* note 27 at 32

⁴² Y. Küçük Kürtler Üzerine Tezler (Ankara: Dönem Yayınevi, 1990) at 48

⁴³ E. O'Ballance, *supra* note 18 at 19

⁴⁴ H. Arfa, *supra* note 13 at 24

even encouraged the Kurdish tribes of Iranian Kurdistan to join the Khalifets (Sultan's) army which participated in defeating the Russian armies. When Russia invaded the Caucasus and moved into Kurdistan, more than six hundred thousand Kurds were killed. The region was further depopulated as a result of the Armenian massacre of 1915-16.⁴⁵

At the turn of the century the Kurdish nationalist leadership had been replaced by modern Kurdish intellectuals. In 1909 when the Young Turks banned all non-Turkish clubs, schools, and publications, a few Kurdish organisations were formed with the aim of propagating Kurdish nationalism and educating the Kurdish people. Several Kurdish political organisations were formed after the First World War, the most influential to emerge being the Kurdistan Teali Cemiyeti (Organisation for the Reinstatement of Kurdistan) which was founded in 1918. They claimed the right of self-determination according to Wilson's 14 Principles.⁴⁶

2.5.3 DIVISION OF KURDISTAN

After the collapse of the Ottoman Empire in October 1918, President Woodrow Wilson, in his 'Programme for World Peace' Point 12, declared that non-Turkish minorities of the Ottoman Empire should be granted the right of autonomous development.⁴⁷ That same year in May the British Army occupied Kerkuk, the largest oil centre in present Iraqi Kurdistan. A few days later they occupied Suleymaniye which according to the Sykes-Picot Agreement should have gone to France. The British, who were well aware that it was rich in oil, had good relations with local Kurdish chieftains and here they set up a local Kurdish administration.⁴⁸

⁴⁵ H. Arfa, *supra* note 13 at 26

⁴⁶ *The Kurdistan File*, *supra* note 7 at 22

⁴⁷ G. Chaliand, *supra* note 27 at 12

⁴⁸ G. Chaliand, *supra* note 27 at 41

In May 1919 Sheikh Mahmud Barzanji, the chief of the region, proclaimed an independent Kurdistan and included a part of Iranian Kurdistan.

Sharif Pasha who was the Kurdish Delegate to the Paris Peace Conference of 1919, demanded independence from Turkey.⁴⁹ After the occupation of Mosul Vilayeti by the British, France was persuaded by Britain to give up its claims to Mosul under the Sykes-Picot Agreement, in exchange for Cilicia. When France learnt of the Mosul oil reserves, new negotiations started. These new negotiations resulted in the San Remo Pact of 24 April 1920 whereby the British Government was guaranteed a 25 % net share at the current market price, in the production of crude oil of the Mesopotamian oil fields. The claim of the Americans to petroleum fields of this region started new negotiations. At the end of the negotiations America obtained a 20 % share in Turkish Petroleum and rights in the exploration of the Mosul and Mesopotamian petrol fields. The agreement settled between France, America and Britain in May 1923, stated that the fate of Mosul would be determined by the Council of the League of Nations.⁵⁰

The Mosul petroleum caused an even bigger rivalry among the imperialist powers over Kurdistan. An enquiry by the Council had established the desire of the Kurdish population for an independent state, but on 5 June 1926, according to the San Remo Pact, Mosul was attached to Iraq and became a British mandate.⁵¹

In the Treaty of Sevres, Kurdistan was defined as a narrow strip of territory lying between the southern frontier of Armenia and Northern Iraq, which covered about a quarter of the Kurdish territory, which was suggested to be under U.S. mandate.⁵² At the conference table, France gave its approval to the creation of a Kurdish state, 'as long as it did not include any of the Kurdish territories bordering

⁴⁹ *Encyclopedia Britannica*, *supra* note 3 at 521

⁵⁰ G. Chaliand, *supra* note 27 at 59

⁵¹ G. Chaliand, *supra* note 27 at 59

⁵² G. Chaliand, *supra* note 27 at 41

on Syria or lying between French Clicia and the western bank of the Euphrates, all of which had been granted to the French in the Sykes-Picot Agreement.⁵³ On 10 August 1920 the Sevres Treaty was signed by the League of the Nations. The regions under French rule were excluded, and there was no mention of the Iranian Kurdistan. Section III (Article 62-64) of the treaty dealt with Kurdistan and read as follows:

Article 62

'A Commission, having its seat in Constantinople [Istanbul] and made up of three members appointed by the Governments of Britain, France and Italy, will, during the six months following the implementation of the present treaty, prepare for local autonomy in those regions where the Kurdish element is preponderant lying east of the Euphrates, to the south of a-still-to-be established Armenian frontier and to the north of the frontier between Turkey, Syria and Mesopotamia, as established in Article 27 II (2 and 3).

Should agreement on any question not be unanimous, the members of the commission will refer it back to their respective Governments. The plan must provide complete guarantees as to the protection of the Assyro-Chaldeans and other ethnic or religious minorities in the area. To this end a commission made up of British, French, Italian, Persian and Kurdish representatives will visit the area so as to determine what adjustments, if any, should be made to the Turkish frontier wherever it coincides with the Persian frontier as laid down in this treaty.'

Article 63

⁵³ G. Chaliand, *supra* note 27 at 42

'The Ottoman Government agrees as of now to accept and execute the decisions of the two commissions envisaged in Article 62 within three months of being notified of those decisions.'

Article 64

'If, after one year has elapsed since the implementation of the present treaty, the Kurdish population of the areas designed in Article 62 calls on the Council of the League of Nations and demonstrates that a majority of the population in these areas wishes to become independent of Turkey, and if the Council then estimates that the population in question is capable of such independence and recommends that it be granted, then Turkey agrees, as of now, to comply with this recommendation and to renounce all rights and titles to the area. The details of this renunciation will be the subject of a special convention between Turkey and the main Allied powers.

If and when the said renunciation is made, no objection shall be raised by the main Allied powers should the Kurds living in that part of Kurdistan at present included in the Vilayet of Mosul seek to become citizens of the newly independent Kurdish state.⁵⁴

After the Turkish victory against the Greeks the Treaty of Lausanne was signed by France, Britain, Italy, Japan, Greece, Rumania, the Serbo-Croat-Sloven state and Turkey on July 1923. According to this agreement most of the Kurdish territories were handed over to Turkish sovereignty and Kurdistan was not even mentioned. It gave international recognition to the Turkish state. It left the delimitation of the northern boundary of Iraq to a friendly agreement between Great Britain and Turkey. Failing this, the dispute would have to be resolved by the Council of the League of Nations. The problem of the Northern Iraq boundary was resolved on 5

⁵⁴ G. Chaliand, *supra* note 27 at 42

June 1926. The Vilayet of Mosul (South of Kurdistan) was attached to Iraq and this came under the British mandate.⁵⁵ With this agreement Turkey surrendered all rights to Mosul in exchange for 10 % of the oil produced in the area, and the British promised to refrain from agitating on behalf of the Kurds and Armenians in the future.⁵⁶

In this way under the Lausanne Treaty the Kurdish lands which had been divided between the Ottoman and Persian Empires since the 16th Century, were carved up into four parts. As the Turkish sociologist and author Ismail Besikci says ‘ One of the most tragic events in the history of the Middle East and the world in the first quarter of the 20th century was the implementation of an interstate colonial system in Kurdistan’⁵⁷

2.6 CURRENT SITUATION IN KURDISTAN

Since 1924, Turkish is the only language that can be used in official publications. Kurdish may neither be spoken in public places nor recorded or reproduced in print.⁵⁸ Indeed, Kurdish people have been imprisoned for recording Kurdish songs and speeches while Kurdish political prisoners were recently given seventeen year sentences for presenting the introduction of their legal defence in the Kurdish language.⁵⁹ Many Kurdish people who had been found guilty of listening to recorded Kurdish songs and speeches, were sentenced to four years or more in prison. To sum up, ‘[i]n Turkey, the Kurds can enjoy basic freedoms and benefit from the principle of equal treatment as long as they deny their ethnic identity’.⁶⁰

⁵⁵ G. Chaliand, *supra* note 27 at 60

⁵⁶ M. Van Bruinessen, *supra* note 5 at 275

⁵⁷ I. Besikçi *Devletlerarasi Sömürge Kürdistan* (Istanbul: Alan Yayıncılık,1990) at 28

⁵⁸ Amnesty International *Turkey Briefing* (London: Amnesty International Publications, 1988) at 4

⁵⁹ Amnesty International *Turkey Briefing* , *supra* note 58 at 65

⁶⁰ I. Besikçi, *supra* note 57 at 29

In Iran, the Khomeini's politics have not changed and the Kurdish struggle continues. During the invasion of Kuwait the Kurdish problem became an international question, but little changed, except that parliamentary elections were held in Iraqi Kurdistan under the supervision of the UN. These elections, however, only took place north of the 36 parallel in Iraq. The Kurds to the south still suffered under Saddam's fascist regime while the rest remain refugees in Turkey, Iran and other countries.

2.7 THE INFLUENCE OF THE KURDISH PROBLEM ON THE POLITICS OF THE SOVEREIGN STATES IN THE REGION

The armed struggle among the imperialist powers during 1915-25 to obtain a bigger share of Kurdistan, ended with the division of Kurdistan. After this division of Kurdistan the local and other imperialist powers formed a new political collaboration to control the Kurdish freedom struggle. This partnership strengthened the ties between the four local imperialist powers, Turkey, Iran, Iraq and Syria and the western imperialists. All the Kurdish uprisings in the south and east of Kurdistan (Iran and Iraq) were suppressed with the help of Britain. Also during the suppression of the Sheikh Said uprising in North-west Kurdistan the Turkish army units were transported there via the railway line through Syria which was a colony of France.

After the Agiri and Dersim revolts the Turkish Government realised that alone it would not be able to control the Kurds. Therefore, it signed the Saadabad Treaty (Suburb of Teheran) on 8 July 1937 with Iran and Iraq. The aim of this "good neighbour treaty" was to take combined action against the Kurds.⁶¹

⁶¹ *The Kurdistan File*, *supra* note 7 at 32

On 24 February 1955 Turkey signed the Baghdad Treaty with Iraq. It was to be the foundation of a regional military agreement (Middle-East Treaty Organisation-METO) to which Great Britain, Pakistan and Iran assented.⁶²

After the July 1958 Revolution in Iraq and withdrawal from the Pact, it adopted the name of CENTO. The aim of the Treaty was explained as 'mutual military assistance in the event of Soviet aggression or internal revolts liable to threaten common security'.

Turkey improved its military relations not only with local powers, but also with western countries. Turkey, in exchange for American aid, sent thousands of Turkish soldiers to fight in Korea and joined NATO on 18 February 1952. On 26 February 1954, Turkey authorised the U.S to set up bases and listening posts throughout the country and in Kurdistan.

As a result of Western support for Turkey, Iran, Iraq and Syria, the Kurdish problem was not included in the agendas of the League of Nations or the United Nations. However, after the 1963 Baath coup against Abdulkarim Qasim in Iraq, the oppression of communists in Iraq reached such high levels that most of the communists sought refuge in the Kurdistan area. In an attempt to halt the oppression of the Iraq Communist Party, Mongolia took the Kurdish problem to the UN. However, after the second coup in 1963 in Iraq, the Iraqi Government embarked on friendlier relations with the United Soviet and Iraqi communists. After this Mongolia withdrew its protest from the UN.⁶³

⁶² *The Kurdistan File, supra* note 7 at 31

⁶³ I. Besikçi, *supra* note 57 at 36

2.8 THE STRUGGLE OF THE KURDISH PEOPLE AGAINST THE COLONIALIST STATES

The plight of the Kurdish people was created out of a desperate life and death struggle against the world's most powerful imperialist states and their local collaborators.

While the Council of the League of Nations was discussing the Kurdish problem, a Kurdish rebellion led by Sheikh Said, broke out in Turkey in February 1925, and it spread to 14 provinces. When the rebellion was crushed, Sheikh Said and 48 Kurdish nationalists were executed.

This rebellion was followed by many uprisings against the new Turkish Republic. The most notable of these are: The 1927-30 Agiri revolt (Mount Ararat). The revolt was started in this region by the new modern Kurdish leadership, because of its strategic geographical and political position. With its formidable natural obstacle of lava rocks of the volcanic Mount Ararat region, it was ideal for long resistance as not even the Russian Armies could break the Jelali tribe's resistance after the two year siege of 1916-18. The Turks, however, had the advantage over the Russian Army, in that they could rely on more effective air power. The Kurdish powers in the south had also been worn out during the Sheikh Said revolt and were now under the strict control of the British and French colonialists in Iraqi and Syrian Kurdistan. But in spite of this, the uprising was not a local or tribal revolt, but a national movement which could be described as a continuation of the Sheikh Said Revolt. After the suppression of the Sheikh Said revolt most of the Kurdish leaders and intellectuals continued their political work in this area because of the geo-political reasons mentioned above. In the spring of 1930, to support this uprising, Kurds in Erzincan and Erzurum provinces also revolted under the leadership of Seid Reza.⁶⁴

⁶⁴ N. Dersimi *Kürdistan Tarihinde Dersim* (Diyarbakir: Dilan Yayinlari, 1992) at 256

Dersim was a province of Kurdistan which had always retained its autonomy. Its inhabitants had not joined the Hamidiah and had refused to participate in the Russo-Turkish wars, the First World War or the Turkish War of Independence.⁶⁵ After the crushing of the Agiri Revolt (Mount Ararat) Dersim became the last target of Ataturk to finish off the Kurdish resistance. In 1936 marshal law was declared in the area and it was put under a state of siege. The name of Dersim was changed to Tunc-eli (Bronze Hand). The Dersim Kurds took a tough stand against the deportation orders and assimilation into the Turkish culture and language. They resolved to resist to the end. After two years resistance in a state of siege, this last Kurdish rebellion was crushed by the massive use of poison gas, air bombardment, and the forests around the villages and towns set alight.⁶⁶ Without regard of age or sex all the people who were caught were killed.⁶⁷

Article 1 of Law No. 1850 of 1930 published in the official Turkish journal reads as follows:

'Murders and other actions committed individually or collectively, from 20 June 1930 to 10 December 1930, by the representatives of the state or the province, by the military or civil authorities, by the local authorities, by guards or militiamen, or by any civilian having helped the above or acted on their behalf, during the pursuit and extermination of the revolts which broke out in Ercis, Zillan, Agridag (Ararat) and the surrounding areas, including Pulumur in Erzincan province and the area of the First Inspectorate, will not be considered a crime.' (The First Inspectorate indicate all Kurdish provinces)⁶⁸

⁶⁵ G. Chaliand, *supra* note 27 at 67

⁶⁶ N. Dersimi, *supra* note 64 at 283

⁶⁷ N. Dersimi, *supra* note 64 at 320

⁶⁸ G. Chaliand, *supra* note 27 at 65

The Second Socialist International Conference adopted a resolution on 30 August 1930 which declared that the massacres which were being committed by the Turkish Government were equivalent to the extermination of the Armenians during the First World War.⁶⁹ After these massacres the Turkish Government issued a law in 1932, whereby the Kurdish land in Turkey was divided into four zones and whereby the Kurds were deported and dispersed.

2.8.1 TURKEY

The Turkish Government, which obtained western imperialistic support after 1925 with the crushing of the Dersim revolt, achieved its aim of military and political control over the north-west of Kurdistan. While Turkey was improving its economic and political relations with western countries after the Second World War, it was simultaneously improving its economical, political, military and assimilation strategy in Kurdistan. As a result of the termination of the traditional Kurdish leadership and the new economic developments in Kurdistan, and except for a few small movements, the period until the seventies was generally quiet.

Although there was a military coup every ten years in Turkey, some Kurdish political organisations were established. In 1969 the Kurdish organisation D.D.K.O (Cultural Revolutionary Centres of the East) was founded and it introduced the modern concept of political organisation as well as new methods and forms of political struggle to the Kurdish people. It played an important role in awakening both class and national conscience. In the same year, with American reinforcements a big military operation to search for fire-arms in Kurdistan took place. The arrest of the leaders of the D.D.K.O was followed by a military coup and by 12 March 1971 a state of siege was imposed.

⁶⁹ G. Chaliand, *supra* note 27 at 66

However, this did not stop the growing idea of an independent Kurdistan among the Kurdish people and further organisations were founded. These parties were the Democratic Party of Kurdistan, the Workers' Party of Kurdistan (D.D.K.D), the Socialist Party of Turkish Kurdistan and the Kurdistan Workers Party (P.K.K) Other organisations were the National Liberation of Kurdistan (K.U.K.) and the Kawa.

In September 1980 another military coup took place in collaboration with the C.I.A. It was announced in Washington even before it was known in Ankara.⁷⁰ The leaders of this coup announced that the reasons for the coup were the threat of Kurdish separatism and the dangers of communism. All the Kurdish organisations were immediately banned, their members savagely tortured or killed and thousands of Kurdish intellectuals escaped abroad. Although on 19 July 1987 the Turkish government lifted martial law in Turkey, the Kurdish provinces were placed under the authority of a 'super governor' who wielded all the arbitrary power of the commanders of martial law. After the coup, every kind of torture was inflicted on Kurds collectively such as the deportation or torture of all the residents of a village followed by the total destruction of the village by burning, bull-dozing or bombing.⁷¹ Neither were these attacks confined within Turkish boundaries. The Turkish army and air force penetrated into Iraqi Kurdistan and Iranian Kurdistan many times.

The popularity of the PKK which had been founded in 1978 was the major reason for the military coup of 1980. As a result of the extensive violations of human rights in Turkey, principally in the Kurdistan area, the Turkish government explained to the Council of Europe that 'under Article 15 of the European Human Rights Convention, it was faced with a threat to its territorial integrity and

⁷⁰ *The Kurdistan File, supra* note 7 at 33

⁷¹ 'Turkey: Human Rights Abuses Against the Kurdish Minority' (London: Amnesty International British Section, 13 September 1989) at 1-2

accordingly it has suspended Human rights conventions for this area of Turkey'.⁷² Since the inception of the PKK's guerrilla war in 1984, many Kurdish tribesmen have been forced to fight against PKK guerrillas as 'village guards'. Approximately 450 000 Turkish troops have also been stationed in Kurdish lands.⁷³ Despite these measures, popular support for the PKK has steadily increased, forcing the Turkish government to admit that 'this was not a mere problem of banditry but a real guerrilla war'.⁷⁴ Today many international and non-governmental organisations recognise the PKK as a national liberation organisation.⁷⁵ The unceasing struggle of the Kurdish people for their national rights under the PKK's leadership has finally forced the authorities to admit that Turkey does have a Kurdish problem. Additional influencing factors, like the pressure exerted by Western Europe, Turkey's desire to be accepted as a full member of the European Community and the effect of the Kurdish question on the international agenda after the Gulf War, have forced the Turkish authorities to formulate an official policy concerning the Kurds.

It has long been known that since the establishment of the modern Turkish State in 1923 the Kurdish language was banned and that all the names of Kurdish villages and towns as well as the names of Kurdish people were replaced by Turkish names. Until recently, however, Turkey refused to acknowledge that there even existed a separate ethnic group known as the Kurds. But as a result of the above factors the ban on speaking Kurdish was lifted in 1991. During the Kurdish rebellion in Iraq in March 1991 the Turkish President invited the Iraqi Kurdish leaders for semi-official talks. He suggested that a federal state would be the best solution in Iraq, implying that such a solution might also be feasible in Turkey.⁷⁶

⁷² R.D.H. Fertig & P. Krommer *The Current Conflict between Turkish Armed Forces and the Kurds of South East Anatolia* [a position paper presented to United Nations Human Rights Commission's Sub-Commission on Prevention of Discrimination and Protection of Minorities as part of the Humanitarian Law Project of the International Educational Development Inc. (IEDI)] at 2

⁷³ A. Ocalan *Interviews and speeches* (London: KSC-KIC Publications, 1992) at 1

⁷⁴ R.D.H. Fertig & P. Krommer, *supra* note 72 at 2; Lord Avebury

⁷⁵ M. Van Bruinessen, *supra* note 5 at 45

⁷⁶ M. Van Bruinessen, *supra* note 5 at 45

But in fact 'very little has yet changed in practice: people are still prosecuted for singing Kurdish songs or writing about Kurdish history; magazines and books are banned; detainees are still tortured as a matter of routine, and mysterious deaths in custody keep occurring.'⁷⁷ Indeed, the Turkish Air Force and troops continue to attack and raid both Turkish⁷⁸ and Iraqi Kurdistan.⁷⁹

2.8.2 IRAQ

As early as 1919, Sir Arnold Wilson, the British Political Officer in Baghdad stated that 'the Kurds wish neither to continue under the Turkish government nor to be placed under the control of the Iraqi government ... [I]n Southern Kurdistan, four out of five people supported Sheikh Mahmoud's plan to set up an independent Kurdistan...'⁸⁰ For this reason, the series of Kurdish revolts which had started in 1918 against the British occupation continued under the leadership of Mahmud Barzanji until 1930. Britain's official responsibility as the Mandatory Power ended in 1930, but she was able to keep her air bases and also maintained a military mission to advise the Iraqi armed forces. The area was important to Britain because in 1927 the richest deposit of oil in the world was discovered in Kurdistan's Kirkuk province.⁸¹ When Iraq applied for membership of the League of Nations, some constitutional safeguards for the Kurdish population were required. The League of Nations, in 1925, awarded the province of Mosul to the new Arab State of Iraq, on condition that

'regard should be had to desires expressed by the Kurds that officials of the Kurdish race should be appointed for the administration of their country,

⁷⁷ M. Van Bruinessen, *supra* note 5 at 46

⁷⁸ J. Rugman 'Kurds caught in Turkish crossfire' *Weekly Mail & Guardian* (December 23 to January 5 1994) 24 at 24

⁷⁹ 'Turk planes continue to bomb Kurds' *The Citizen* (23 March 1995)

⁸⁰ A. Wilson *Mesopotamia 1917-1920* (London, 1931) at 103, 127, 129, 134, 137

⁸¹ M. Short *The Kurds* (London: Minority Rights Group, 1981) at 11

the dispensation of justice and teaching in the schools, and that Kurdish should be the official language of all these services.⁸²

When in 1932, the new Iraqi government decided to establish tighter central control, the Kurds demanded a separate administration and an assembly for Kurdistan. When these demands were ignored, another rebellion broke out under the leadership of Mustafa Barzani. The Kurdistan was bombarded by the Royal Air Force and 79 Kurdish villages were destroyed.⁸³ Mustafa Barzani and his people were driven over the border into Turkey. When the Kurds under Barzani's leadership revolted again in 1943, this rebellion was also suppressed with the help of the Royal Air Force. This time the Kurds fled to Iran where Barzani took command of the forces of the Kurdish Mahabad Republic. After the collapse of the Mahabad Republic, Mustafa Barzani and the best of his troops forced their way through the lines on the Iraqi, Iranian and Turkish borders and sought refuge in the Soviet Union. Barzani and his men were granted asylum in the Soviet Union for eleven years.

After the 1958 military coup, led by Abdulkrim Qassem, which was well disposed towards the Soviet Union, all parties which had until then been banned, such as the Iraqi Communist Party and Kurdistan Democratic Party, were legalised. Barzani and his people returned to Iraq.

For the first time a country which included a part of Kurdistan recognised the national rights of the Kurdish People in its constitution: "Iraqi society is based on the complete co-operation between all its citizens, with respect for their rights and liberties. Arabs and Kurds are associates in this nation; the constitution guarantees their national rights within the Iraqi whole." (Article 3)⁸⁴ But this freedom was short lived as Qassem banned the political parties one by one and rejected Kurdish

⁸² M. Short, *supra* note 81 at 10
⁸³ B. Nikitin, *supra* note 2 at 352
⁸⁴ G. Chaliand, *supra* note 27 at 165

autonomy. This caused the first clashes between Kurds and Iraqi troops in September 1961 and contributed to Qassem's downfall in February 1963.⁸⁵ A similar chain of events was repeated during the coup in 1968, when the new leader started his rule with friendly gestures and promises to the Kurds which were once again followed by the rejection of all Kurdish demands and military occupation. From 1961 to 1970 the fighting went on with few interruptions until the 11 March 1970 agreement, which promised the Kurds regional autonomy and proportional participation in the affairs of state. This agreement was greeted by both sides as a historic event. But the government and the Kurds never reached consensus on the delimitation of Kurdistan. The Kurds demanded that the oil-rich districts of Kirkuk and Khanaqin, where the Kurds formed the majority of the population, be included. Instead, the government began Arabizing the district, forcibly expelling Kurds and replacing them with Arabs. The new Constitution of 17 July 1970 did not include the 10th article of the agreement which accepted that '[t]wo main nations, the Arab nation and the Kurdish nation make up the Iraqi people. The constitution recognises the national rights of the Kurdish people...'

On the other hand, there were international developments in the area too. In 1971, after the last British troops had left the Gulf, Iran occupied the islands in the Straits of Hormuz, which control access to the Gulf. The same year Iraq nationalized the Iraq Petrol Company. The Western Countries responded to this with an economic boycott while Iraq speeded up the Arabization of the petroleum-rich district of Kurdistan. These developments made Iraq more dependent on the Soviet Union and so a 'friendship and co-operation treaty' was concluded in April 1972. This brought Barzani closer to America and the Shah. Barzani met Kissinger in Teheran and was given promises of support.

The war between the Kurds and the Iraqi government continued. In March 1974, the Iraqi government unilaterally proclaimed a law which granted a certain amount

⁸⁵ M. Van Bruinessen, *supra* note 5 at 28

of autonomy to the Iraqi Kurds and demarcated an autonomous area for the Kurds which excluded the oil-rich districts of Kurdistan. This was rejected by Barzani.

Iran and Iraq during the OPEC Conference in Algiers, on 6 March 1975, made an official agreement whereby in exchange for stopping aid to the Kurds, the major control of the Shatt al-Arab (Persian Gulf) was given to Iran. On the following day, Iran withdrew its support from Kurdistan and the Iraqi army launched a heavy offensive on Kurdistan. Within a matter of days, the Kurdish movement was politically crushed and the population of all districts fled into Iran. Shortly thereafter some 250 thousand Kurdish refugees arrived in Iran.⁸⁶ After a 40 year struggle, Barzani left for the US as a political refugee where he died of lung cancer at the age of 75. The Iraqi government continued with its Arabization policies with mass deportations to the south. In 1976, the government started evacuating all Kurdish villagers from a 10-20 kilometre wide strip along the Persian and Turkish borders and resettling them in camps or strategic villages. Soon a new guerrilla war began and since 1987 the Kurdish front has continued to struggle against Saddam Husein's regime. During the Iran-Iraq war, on both sides of the border, Kurdish civilians were victims of their own governments as well as being bombarded by the other side. In fact, Iraq systematically used chemical weapons against the Kurds during the war, chemically bombing and killing 5000 and maiming another 10 000 people in the Kurdish town of Halabja. This finally brought international attention to the Kurdish issue but there was no effective pressure on Iraq. After the cease-fire of August 1988 with Iran, Iraq again sent its Air Force and troops to Kurdistan, killing and injuring thousands of people with chemical weapons and poison gas. Around 65 000 people took refuge in Turkey and an unknown number went to Iran. In this period some 4000 Kurdish villages had been destroyed.⁸⁷

⁸⁶ M. Van Bruinessen, *supra* note 5 at 28-30

⁸⁷ M. Van Bruinessen, *supra* note 5 at 44

After the Gulf War, the tragedy was repeated when Iraqi warplanes, which had been forbidden to fly in terms of the UN cease-fire conditions, again attacked Kurdish civilians with chemical gas and bombing.⁸⁸ This time more than 2 million (about half of the Iraqi Kurdish population) fled from their homes.⁸⁹ Under the pressure of western public opinion the Allied powers occupied a narrow strip of the 36th parallel of the northern Iraqi Kurdistan which became a 'security zone' for the Kurds where they now became refugees in their own country.⁹⁰

2.8.3 SYRIA

During the French mandate of Syria, there was no strong repression of the Kurds, who were a minority in this area. At times Kurds from other parts of the Kurdistan started political activities and publications here. After the French and British troops left in 1946, an independent Syria has been ruled by a Pan-Arabist ideology and has refused to recognise the Kurds as a national minority. In Kurdish towns state education was in Arabic, but schoolbooks in Kurdish were freely circulated.⁹¹

In 1957 a group of Kurds founded the Kurdish Democratic Party in Syria, based on the model of the Iraqi KDP. Its program was to obtain recognition for the Kurds as an ethnic group entitling them to their own culture. In 1959, when Egypt and Syria united into the United Arab Republic, the leaders of Kurdish political parties were arrested.

When Syria broke away from Egypt in 1961, the Kurds were accused of revolting against Arabism and complicity with the Iraqi Kurds against Iraq. In August 1961, the government promulgated a decree (No. 93) authorising a special population

⁸⁸ L. Beyer, *supra* note 11 at 12

⁸⁹ M. Van Bruinessen, *supra* note 5 at 44

⁹⁰ See Appendix A

⁹¹ C. Hitchens, *supra* note 11 at 32; M. Ignatieff *Blood & Belonging, Journeys into New Nationalism* (UK: Vintage, 1995) at 161

census in Jezireh Province (Syrian Kurdistan). It was claimed that Kurds from Turkish Kurdistan were illegally infiltrating Jezireh in order to destroy the Arab character. At the conclusion of the census taking, 120 000 Kurds were branded as foreigners and unjustly stripped of their rights as Syrian citizens. The following year the government announced the Al Hizam al-arabi ('Arab Cordon Plan'), which envisaged the expulsion of the entire Kurdish population living along the Turkish border. The discovery of the oil at Qaratchok in the middle of the Kurdish province Jezireh and the building of the great Tabqa dam on the Euphrates hastened execution of this plan.

During the seventies, 40 modern villages were constructed by the government in the 'Arab Cordon' zone and 7000 armed Arab peasant families were settled there while about 30 000 Kurds from Jezireh were forced to leave. They sought refuge in Lebanon and in other Syrian towns.⁹² In 1976, President Assad renounced the plan to transfer the Kurdish population..

2.8.4 IRAN

In East Kurdistan (Iranian Kurdistan) a large revolt broke out in 1920 in the north of the East Kurdistan. It was led by Ismail Agha (Simko). Between 1920 and 1925 he managed to take control of the entire region west of Lake Urmiah.⁹³ He proclaimed the independence of the whole of Kurdistan. Later, after Reza Shah seized power with the help of the British and quelled the Kurdish uprisings of Sharik, the leader of the rebellion, Simko, was assassinated by the police while on his way to negotiate with the Iranian government on 21 June 1930. During the Mount Ararat revolt another uprising was taking place in the south of Iranian Kurdistan which was led by Jafar Sultan. This uprising was quelled by the Turkish

⁹² G. Chaliand, *supra* note 27 at 216

⁹³ E. O'Ballance, *supra* note 18 at 30

and Iranian governments. Most of the Jalali and Hayadaranli Kurdish clans who had supported the rebellion were deported to other regions. Neither the Shah's visit to Ataturk in 1934 or the Pact of the Saadabad between Turkey, Iran and Iraq in 1937 stopped the conflict between the Kurds and the Iranian government until the eve of the Second World War.

2.8.4.1 The Kurdish Republic of Mahabad

In 1941, Britain and the Soviet Union, on behalf of the Allies, invaded Iran⁹⁴ to dislodge Shah Reza and put an end to the possibility that his sympathy for Germany might turn into a military alliance with the Axis powers. The Mahabad area which had not been occupied by the Allied powers was an area with a long tradition of Kurdish nationalism. In fact, for more than four years the Kurds had effectively ruled themselves.

In September 1942, the Kurds of Mahabad formed the Kurdish political movement, the Komela J.K. This movement which soon had mass support, developed into a political party, the Kurdish Democratic Party. On January 24, 1946, the first Kurdish Republic was proclaimed under the leadership of Qazi Mohammed. When the Allied forces withdrew from Iran in 1946, the Iranian army began to disarm the supporters of the Kurdish Republic. Qazi Mohammed and two compatriots were sentenced to death and hanged in Mahabad's Tchouar Tchra Square. Thus the Kurdish Republic of Mahabad which had been founded under Soviet influence lasted less than one year.

After the Mahabad Republic, the ever more centralized rule of the Shah, reinforced by the Western powers, prevented any sustained revival of a Kurdish movement. During the last years of the Shah's dictatorship, all of Kurdistan was militarized,

⁹⁴ H. Arfa, *supra* note 13 at 60

but in spite of this, the Kurds played an important role in the overthrow of the Shah's regime. After the overthrow of the Shah, the Kurdish Peshmergas (K.D.P. of Iran's partisans) occupied the Kermanshah, Ormiyah and Sanandaj barracks. After a lapse of 33 years, a variety of publications began to reappear legally in the Kurdish language after the Iranian revolution.

In the summer of 1978, Kurdish Political prisoners (the leaders of the KDP-Iran), who had been arrested 23 years before, were released. As soon as the first post-revolutionary government was established in Teheran, in February 1979, discussions and negotiations on the future status of Kurdistan began between representatives of the Kurds and the revolutionary authorities in Iran's capital. The Ayatollah Khomeini's response to the Kurdish demand for autonomy and democracy was that 'these two words do not figure in the Qoran and are alien to Islam. Within the Islamic Republic all Muslims have equal rights.'⁹⁵ The referendum on the Islamic Republic was largely boycotted in Kurdistan. Most of Iran's left-wing opposition groups established themselves in Kurdistan, which was becoming an increasingly important base for them as they were under severe attacks elsewhere in the country. From the perspective of Teheran, all the enemies of the Islamic regime were concentrated in Iranian Kurdistan.⁹⁶ On 17 August 1979, Khomeini made his famous speech in which he described the Kurds as 'children of Satan, the worst of infidels.' He asked the army to crush them as quickly as possible.⁹⁷ The army and Revolutionary Guards occupied the cities and towns, killing hundreds of Kurds in the first battles, while many were executed later after summary revolutionary 'justice'. But the Kurdish guerrilla resistance could not be broken. A few months later the government agreed to a cease-fire and negotiations with the Kurdish leaders. Most of the Kurdish towns were again under Kurdish control. At the end of March 1980 in the first post-revolutionary election, the overwhelming support of the Kurds for the KDP-Iran, caused the

⁹⁵ *The Kurdistan File*, *supra* note 7 at 65

⁹⁶ M. Van Bruinessen, *supra* note 5 at 36

⁹⁷ *The Kurdistan File*, *supra* note 7 at 56

party's leader, Abdul Rahman Ghassemlou to become 'persona non grata'. The Khomeini regime now launched a new offensive against the Kurds. When the war between Iran and Iraq broke out, the old pattern repeated itself with both hostile states attempting to use each other's Kurds. Immediately after the Iraqi attack, the KDP-Iran announced its loyalty to Iran and proposed a settlement with the central government. The authorities rejected the offer, and throughout the Iran-Iraq war, the Iranian forces continued fighting the Iranian Kurds. The KDP-Iran's leader, Abdul Rahaman Ghassemlou and two other Kurds were murdered by the Iranian authorities in July 1989 while they were sitting at the negotiating table in Vienna.

2.8.5 SOVIET UNION

Traditionally, in the region west of Azerbaijan, the Kurds formed a majority of the population in an area centred around the city of Lachin which became known as 'Red' Kurdistan. In the early twentieth century, the Kurdish leader in Iraq, Sheikh Mahmoud Barzinji, wrote to Lenin, requesting Soviet aid in the struggle against British imperialism. In his response, Lenin mentioned his concern about the role of 'Soviet Kurds' in the Kurdish struggle.⁹⁸ He also supported the idea of an autonomous Soviet Kurdistan and promised a grant of 40 million roubles to realise this aim.

In the Non-Aggression pact of 1921, Turkey and the Soviet Union agreed that the Kurdish area of which Lachin was the capital would be incorporated into the Azerbaijan Soviet Socialist Republic with Nagorny Karabakh although they were both autonomous regions. Kurdistan remained an autonomous region under Azerbaijan until 1925. A Kurdish governing authority was established, schools and a teacher training college were founded and books and periodicals were

⁹⁸ V.I. Lenin *Works* Volume 4 Part 3 at 100: Mihoyi quotes a letter from Lenin to Nnkimanoy, Secretary of the Baku Communist Party

published in Kurdish. By 1933, these rights, however, had been curtailed, largely as a consequence of the Soviet desire to remain on good terms with Turkey. In 1938, Kurds were deported from Azerbaijan and Armenia while in 1944, the Kurds of Georgia were sent to the 'special colonies' and Siberia. These deportations were denied by the authorities who claimed that the Kurds had been assimilated with the Muslim Azerians.

Ethnic conflicts have led to many Kurds leaving the Central Asian republics for Transcaucasia, particularly the Krasnodar area. In fact, Armenia is the only Soviet republic which preserved and protected Kurdish culture after the persecution under Stalin. In 1990 a symposium on the status of the Kurds was held in Lausanne. Attended by about 800 Kurds, including the PKK, a resolution was passed that the Kurdish people do comprise a nation. It was further declared that the Kurdish question should be referred to the United Nations in the hope that a solution would be found on the basis of self-determination. In 1992, the Lachin Republic of Kurdistan was established by the Soviet Kurds. It has, however, not yet received official recognition.

Although the Kurds have been systematically suppressed by an inhumane policy of divide and rule, the national liberation movement continues to gain support and is determined to reach its goal of self-determination for the Kurdish nation.⁹⁹

⁹⁹ C. Hitchens, *supra* note 11 at 32; M. Ignatieff, *supra* note 91 at 161

3. THE DEVELOPMENT AND ORIGINS OF THE RIGHT OF SELF-DETERMINATION

3.1 INTRODUCTION

Due to the different forms and various applications of the concept of the right of self-determination, there is no certain or single origin of this right. Any understanding is relative to the scholar's focus. Even at the semantic level there are problems: to analyse the phrase 'the right of self-determination of peoples' requires examination of each of the constituent elements such as: What is a right? Who is the self? What is to be determined? Then there is also the variety of the constituent elements' interactive meanings, viz., which self determines rights, which rights determine the self and how these words are understood and used effectively in relation to each other. Aside from the purely semantic and syntactical problems there are the added problems of its highly political content whereby the right of self-determination has been given different definitions due to different ideological and economical conflicts between actors in the international community and between scholars of different schools. Although there is agreement that the term 'self-determination' was first used in the late eighteenth century by German philosophers and scholars who derived it from the German word 'Selbstbestimmungsrecht',¹⁰⁰ there are different ideas concerning the origin of the term.

Its theoretical lineage can even be traced back as far as Greek classical philosophy.¹⁰¹ It has also been recorded that during the late Middle Ages and early Renaissance, Marsilius of Padua talked about legitimate government as based on the consent of the governed while Dante raised the issue of autonomy for cultural groups. In the sixteenth century, French king Franz I, objected to a transfer of territory to Spain's Charles V with the

¹⁰⁰ U.O. Umzorike *Self-determination in International Law* (Hamden: Archon Books, 1972) at 3
¹⁰¹ E. Rivera-Ramos 'Self-determination and Decolonisation in the Society of the Modern Colonial Welfare State' in W. Twining *Issues of Self-determination* (Aberdeen: Aberdeen University Press, 1991)

argument that one cannot decide the future of cities and provinces without their 'consignment express.'¹⁰² The seventeenth century international jurist Hugo Grotius also spoke of the right of resistance and the right of secession 'ius resistendi ac secessionis' for oppressed peoples.¹⁰³

During the seventeenth and eighteenth centuries, the principle of national self-determination grew further with the concept of natural rights, the rights of man, the sovereignty of the people, the social contract between the government and governed and the right of revolution against oppressive regimes. It was argued that the government should be based on the will of the people rather than on that of the monarch and that people living in a geographically separate part of an existing political unit who were not content with being subjected to domination by an alien group of people should be able to secede and organise themselves as they wished.¹⁰⁴

The products of conquest or dynastic union of multinational states and empires were regarded as illegitimate political entities, the only legitimate form of government being 'self-government by natural political units.'¹⁰⁵ Therefore the principle of self-determination was intimately linked with the ideology of nationalism which started in Western and Central Europe in the sixteenth century.¹⁰⁶ Under the European regional multinational Peace Treaty of Westphalia in 1648, the emerging nation-states of Europe undertook to live in peace with one another on the basis of the sovereign equality of all states and non-interference in the internal affairs of another state.¹⁰⁷

¹⁰² B. Neuberger, *supra* note 1 at 3

¹⁰³ B. Neuberger, *supra* note 1 at 4

¹⁰⁴ R. Sureda *The Evolution of the Right of Self-determination: A Study of United Nations Practice*, (Leiden: Sijthoff & Noordhoff, 1973) at 17

¹⁰⁵ L.C. Buchheit *Secession: The Legitimacy of Self-Determination* (London: Yale University Press, 1978) at 4

¹⁰⁶ A. Eide 'The Universal Declaration in Space and Time' in J. Berting *et al* (eds.) *Human Rights in a Pluralist World: Individuals and Collectivities* (London: Meckler, 1990) 15 at 23

¹⁰⁷ S.O. Gyandoh, Jr. 'Human Rights and the Acquisition of National Sovereignty' in J. Berting *et al* (Eds.) *Human Rights in a Pluralist World: Individuals and Collectivities* (London: Meckler, 1990) 171 at 171

European expansion abroad in the fifteenth century re-shaped the future political, social and economic structure of the world. The colonial power of the Spanish and Portuguese which was closely followed by the Dutch, the British and the French did not take too long to divide America, India, Africa, and the East and West Indies. Meanwhile new powers had emerged in central Europe with the disintegration of the Holy Roman Empire and the withdrawal of the Ottoman Empire from Europe under Austrian pressure.

By the late eighteenth century there were demands of independence from the earliest overseas colonies. The year 1776 saw the declaration of independence of North America from the British Empire. Although the main slogan of the war was 'the right of national self-determination', there was not, in fact, any separate and identifiable American nation with a common history, language, culture or a well-defined territory. The settlers who did not have any criterion of nationhood demanded 'the right of national self-determination' based on the 'individualist, liberal notion of self-determination' and conveniently ignored the right of self-determination of the native Americans who were eliminated in the acquisition of land or herded into reservations. Independence, in fact, was the cultural and historical birth of the nation which continued to expand in the following decades. At the expense of the native Americans (so-called Indians), the expansion westwards continued through settlement by Americans and immigration from Western, Central and Northern Europe. The population of 3.9 million in 1790 doubled in 1810 to 7.2 million. *Inter alia* the following states were established after the independence of America: Kentucky in 1792, Tennessee in 1796, Ohio in 1803, Louisiana in 1812, Indiana in 1816, Mississippi in 1817, Illinois in 1818 and Alabama in 1819.¹⁰⁸

The trend set by America's independence is directly related to the growth of the middle class in the world as a political and economic entity. This separation from the rule of the host country was inimical to the bourgeois rebellion against the aristocracy and with it came the bourgeois ideology of J. S. Mill, Adam Smith and Alexander Hamilton which

¹⁰⁸ H. Kinder & W. Hilgemann *The Penguin Atlas of World History Volume II: From the French Revolution to the Present* (London: Penguin Books Ltd, 1978) at 15

laid the foundations for the power of American capitalism. These were the building blocks of the American Constitution and Bill of Rights.

As this concept of national self-determination was moulded by a European ethos, it was not geared to dealing with other population groups, cultures or identities except as subordinates or subjects which could be assimilated into their value systems. As William Makgoba points out, 'It appears that in their conception, classical Western democracies were not designed for multiracialism or multiculturalism.'¹⁰⁹ The democratic school that represents this ideology defines national self-determination as government by consent of the governed and not as national government according to any ethnocultural criteria. Basically, according to the democratic school, self-determination is equal to a democratic self-government within a given territory. According to this Anglo-American view, the nation is a community of organisation of life and traditions.¹¹⁰

According to Lee Buchheit, the origin of the right of self-determination was a response to the imperial, dynastic domination of an alien group over another collectivity. In America's case there is no such history. As Buchheit points out:

'If the history were a chronicle of the voluntary association and disassociation of human groups, there would be no need for a doctrine of self-determination. Without the effects of the conquest, forced annexation, subjugation, dynastic union, and colonial expansion, the world's peoples would presumably now be arranged into freely chosen political units. It is the distinct absence of such a peaceful evolution of mankind's social organisation which ultimately gave rise to the principle of self-determination as the twentieth century's primary expression of disapproval of involuntary political association.'¹¹¹

¹⁰⁹ W. Makgoba 'In Search of the Ideal Democratic Model for SA' *Sunday Times* 27 October 1996 23

¹¹⁰ J.A. Sigler *Minority Rights: A Comparative Analysis* (London, Greenwood Press, 1983) at 20

¹¹¹ L.C. Buchheit, *supra* note 105 at 3

Consequently America has no concept of collective self-determination, because it is anathema to their condition. The Americans, in fact, were like Britain's Saxons and Normans occupying that land and country and establishing their wealth and power at the expense of the natives. For instance, the native American's right of self-determination and sovereignty was definitely not considered by the founding fathers over their 'Thanksgiving Turkey'. To consolidate the economic and racial fabric of their society, these new Americans encouraged European settlers and imported slaves from Africa to replace the native Americans who had been forced off their land. This fight for independence from Britain was supported by the French, Spanish, Portuguese and Dutch not because of their belief in self-determination but because they wished to weaken their rival. Tragically and ironically, they were simultaneously busy colonising other parts of the world at the expense of the local inhabitants.

3.2 THE FRENCH REVOLUTION AND SELF-DETERMINATION

The French Revolution of 1789 was the spearhead and chief embodiment of the European democratic movement which aimed to radically reform the political sphere. The underlying principles of the French Revolution were the *sovereignty of the people, personal liberty and social equality*. It postulated the right of the people to determine their destiny and questioned the divine right of hereditary monarchs. Another principle that was given prominence was the idea of nations united by ties of blood, religion, common traditions and aspirations rather than states under an arbitrary authority. In addition to these general principles, which influenced the peoples not only of Europe but throughout the world, the French Revolution had a tremendous impact on the political constellations of Europe, laying the foundations for the unification of the modern German Empire and the Kingdom of Italy. The doctrine of national self-determination was a guiding principle in the annexation of enclaves in which plebiscites played a large part.¹¹²

¹¹² H.A. Wilson *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press, 1988) at 55

'National self-determination is perceived to be fulfilled insofar as the citizens of the nation are ruled by their 'kith and kin'...National self-determination according to the nationalists' point of view is compatible with dictatorship as long as it is national.'¹¹³ John Stuart Mill in his *Considerations on Representative Government* argued that 'it is in general a necessary consideration of free institutions that the boundaries of governments should coincide in the main with those of nationalities.'¹¹⁴ According to Brownlie, 'In the course of nineteenth century European history the principle of nationality was influential and it was the alter ego of the principle of self-determination.'¹¹⁵

For Britain's place in the world, the French Revolution was of even greater significance as it placed Britain in a position to expand and consolidate her colonial empire. At a time when the continent had been rendered economically powerless by continual wars and disruption, Britain could use and build on the inventions of the Industrial Revolution and thereby gain an economic lead of half a century. British imperialism which led to intense naval rivalry with Germany, stimulated the scramble for colonies among the European powers in which no consideration was given to the principle of self-determination for those who had been colonised. This accelerated the re-division of the rest of the world while the struggle among the imperialist powers for the most favourable territorial division was a contributory cause of two world wars.

The disintegration of the Ottoman and Austro-Hungarian empires and the rise of nationalism in the Balkan states led to many crises which finally culminated in the outbreak of World War I. As the principle of self-determination had led to the Balkan wars and ultimately the Great War, it became a serious topic of political debate in the twentieth century.

¹¹³ B. Neuberger, *supra* note 1 at 4-5; H. Kinder & W. Hilgemann, *supra* note 108 at 41

¹¹⁴ H. Hannum 'Rethinking Self-Determination' (1993) Vol 34 No 1 *Virginia Journal of International Law* 1 at 3

¹¹⁵ I. Brownlie 'The Rights of Peoples in Modern International Law' in J. Crawford (Ed) *The Rights of Peoples* (Oxford: Clarendon, 1988) 1 at 4

3.3 SOCIALIST IDEAS AND SELF-DETERMINATION

Although the Marxists came late to the national self-determination debate, being specifically mentioned for the first time at the First Socialist International in 1865,¹¹⁶ Marx and Engels were fully in support of Polish national independence. Practically, this included the right of secession as Poland had been partitioned into three subordinate states which were respectively occupied by Austria, Prussia and Russia. At the 1896 London International Congress it was accepted as a general principle that all nations should have full rights of national self-determination.¹¹⁷

This concept was further elaborated in Lenin's thesis on the rights of nations to self-determination. According to Lenin, the concept of self-determination of nations is best understood in an historical-economic context of the national movements and not in an abstract legal definition that is deduced from all sorts of general concepts of law.¹¹⁸ Thus, when the right of nations to self-determination was confirmed in Clause 9 of the Russian Marxists' Programme in 1903, it led to serious discussion among Marxist theoreticians. While the Polish Socialist Party was in support of national independence of the Polish people, Rosa Luxemburg, a leader of the revolutionary socialists in Poland, argued that national independence was historically reactionary and a threat to the unity of workers. She propagated the principle of 'international' as opposed to 'national' self-determination.¹¹⁹ The Austrian Marxist theoretician, Otto Bauer, believed that political and cultural autonomy should be given to the different national groups but that they should not be granted the right of self-determination in order to preserve the unity of the workers' movement.¹²⁰

¹¹⁶ B. Neuberger, *supra* note 1 at 5

¹¹⁷ .I. Lenin *Questions of National Policy and Proletarian Internationalism* (Moscow: Progress Publishers, 1977) at 80

¹¹⁸ V. I. Lenin, *supra* note 117 at 45

¹¹⁹ H.B. Davis *Toward a Marxist Theory of Nationalism* (New York: Monthly Review Press, 1978) at 58; B. Neuberger, *supra* note 1 at 70

¹²⁰ H.B. Davis, *supra* note 119 at 58

Despite Marx's support for the Irish struggle for independence, the British socialists similarly believed that the unity of the British working class would be preserved by not granting independence to the Irish.¹²¹

In support of Lenin's philosophy, some scholars connect the psychological roots of the collective principle of self-determination to demands of human desire to associate primarily with one's immediate fellows (family, clan, tribe or village) and to continue living in a familiar environment within an insular group in which one feels secure and comfortable. In their view, the historical experience of the harsh treatment and exploitation of groups ruled by an alien people is the moral reason for the recognition of the collective right of self-determination.¹²² Viewed from this perspective, the rights of the individual are subordinate to that of the community.

Lenin, however, firmly asserted that political self-determination can mean nothing else but the right to secede and form an independent state. The concept was further elaborated in Lenin's thesis of the rights of nations to self-determination.¹²³

In Lenin's Marxist argument, self-determination means 'the political separation of a nation from alien national bodies, and the formation of an independent national state.'¹²⁴ The recognition of the right to secession is also accepted as a pre-condition of the 'recognition of national equality.'¹²⁵ Lenin compared the right to self-determination to that of divorce, and decried annexation of the colonial territories as a violation of the principle.¹²⁶ In contrast with Western jurists who claimed that the principle had no legal content, being an

¹²¹ H.B. Davis, *supra* note 119 at 58

¹²² L.C. Buchheit, *supra* note 105 at 2

¹²³ V. I. Lenin, *supra* note 117 at 71

¹²⁴ V.I. Lenin, *supra* note 117 at 80

¹²⁵ V.I. Lenin, *supra* note 117 at 71

¹²⁶ I.G. Shivji in W. Twining (Ed) *Issues of Self-determination* (Aberdeen: Aberdeen University Press, 1991) at 34

ill defined concept of policy and morality,¹²⁷ socialists viewed the principle of self-determination as one of international law.¹²⁸

On 15 November 1917, the Soviet Government issued the Declaration of Rights of the People of Russia, laying down the policy for Russia's minorities, which remained in the Constitution of the USSR until the dissolution of the Soviet Union. It recognises the equality and sovereignty of the peoples of Russia, including the right of complete separation and the establishment of free, independent states.¹²⁹ The appearance of the principle of self-determination as an operative political principle dates from the Bolshevik revolution and the peace settlements at the end of the First World War.

The Soviet State was the first to put it into practice when proclaiming the complete independence of Finland in 1918 with the 'Declaration of Rights of the Working and Exploited Peoples'.¹³⁰ In the international field, the socialist concept of the right of self-determination contained the following elements and found application as follows:

- (a) The right of self-determination of peoples, to be applied to both national groups in Europe as well as to peoples under colonial domination.¹³¹
- (b) In Lenin's thesis the principle applied not only to colonial nations, but to independent states as well.¹³²
- (c) It is a continuing principle and can be invoked at any time by an oppressed nation even in a sovereign state.¹³³ This right was even applicable to the

¹²⁷ I. Brownlie *Principles of Public International Law* (Oxford, Clarendon Press, 1990; 4th edition) at 597

¹²⁸ A. Cristescu 'Self-determination' in *Encyclopedia of Public International Law* (Amsterdam: Maz Planck Institute of Comparative Public Law and International Law, 1985) Volume 8 at 470

¹²⁹ I.G. Shivji, *supra* note 126 at 34

¹³⁰ I.G. Shivji, *supra* note 126 at 34

¹³¹ A. Cassese *International Law in a Divided World* (Oxford: Clarendon Press, 1986) at 58

¹³² I.G. Shivji, *supra* note 126 at 34

¹³³ I.G. Shivji, *supra* note 126 at 35

Union Republics of the Soviet Union. The right to freely secede from the USSR was included in the USSR constitutions of 1924, 1936 and 1977.¹³⁴

- (d) Liberation of non-self-governing peoples from colonial domination. Lenin, for example, decried annexation of the colonial territories as a violation of this principle.
- (e) The right to independence in the political sense, to separation from the oppressor nation.
- (f) Liberation from racist domination and
- (g) Liberation from foreign occupation.¹³⁵

The colonial powers had an inherent hypocrisy in their thinking in that they applied the right of self-determination according to the individualist concept to their settler colonies, while refusing state sovereignty or territorial unity to their colonies. This remained the *status quo* until World War I. During this war, the rallying call of self-determination became the hope of liberation for the oppressed peoples. World War I saw the emergence of new states and the drawing of borders of new territories at the negotiation tables, not according to the self-determination that had been promised, but rather according to the Allied Powers' interests.

¹³⁴ B. Neuberger, *supra* note 1 at 70

¹³⁵ A. Cassese 'Political Self-Determination - Old concepts and New Developments' in A. Cassese (Ed) *UN Law / Fundamental Rights: Two Topics in International Law* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) 137 at 139

3.4 LIBERAL IDEAS AND SELF-DETERMINATION

The principle of self-determination was also elevated to international level by the President of the United States, Woodrow Wilson, during the First World War. He evoked the principle of self-determination in his 'fourteen points' as the aim of the war, which was consequently often referred to as the 'war of self-determination'.¹³⁶ On 27 May 1916 he declared that 'every people has the right to choose the sovereignty under which they shall live and in February 1918 the essence of the Wilsonian concept of the principle of self-determination was clearly manifested in his statement that national aspirations must be respected and that people should be dominated and governed only by their own consent. 'Self-determination is not a mere phrase, it is an imperative principle of action, which statesmen will henceforth ignore at their peril.'¹³⁷

In accordance with the early slogan of 'the defence of small nations', President Woodrow Wilson proposed a post-war order in which ethnically identifiable peoples or nations would govern themselves. His concern for oppressed ethnic nationalities led to three of the central interlocking elements of the post-war settlement: a scheme whereby identifiable peoples were to be accorded statehood; the fate of disputed border areas was to be decided by plebiscite; and those ethnic groups too small or too dispersed to be eligible for either course of action were to benefit from the protection of special minority regimes, supervised by the Council of the new League of Nations.¹³⁸

Towards the end of the First World War, the British and American Governments indicated that the peace settlement should be based on respect for the 'self-determination of nations'. This was the excuse for consenting to the complete break-up of the Austro-Hungarian union, Ottoman Empire and Czarist Russia.¹³⁹ While strictly defending their

¹³⁶ U.O. Umozurike, *supra* note 100 at 11 and 13-14

¹³⁷ H.S. Johnson *Self-determination within the Community of Nations* (Leiden: A.W. Sijthoff, 1967) at 33

¹³⁸ A. Whelan 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 *International and Comparative Law Quarterly* 99 at 100

¹³⁹ I.G. Shivji, *supra* note 126 at 34

territorial integrity and state sovereignty, in London in February 1918, a meeting of Allied experts on propaganda decided deliberately to encourage all the anti-German minorities in Austria-Hungary as a means of breaking her power as the weakest link in the German alliances. In fact, a subsequent meeting at Rome of the 'Congress of Oppressed Nationalities' demanded the abolition of Austria.¹⁴⁰ It was also a reason for the alignment of frontiers in Europe.

Although the idea was to grant self-determination to all nations, this did not work in practice. 'President Wilson promised self-determination to peoples. But when it came to dismantling the defeated empires, that principle applied only selectively. New States were created with ruler and red pencil at the conference tables of Versailles; now many of them are in danger of disintegration.'¹⁴¹

Many of the territorial decisions were based on secret agreements reached among the European Allies during the war. In the former Ottoman Empire, the 1920 Treaty of Sevres should have created an autonomous Kurdish region which could have become independent after a year, but the treaty was never implemented.¹⁴²

Although the doctrine of the right of self-determination and protection of national minorities were prominent in the discussions of the Allied Supreme Council at Versailles in 1919, the special application of such institutions were far from a general recognition of 'the principle of equal rights and self-determination of peoples.'

Self-determination was subsequently far from fully realised in the Paris Peace Treaties. Although these treaties were fairly similar, they may be divided into three categories: treaties imposed on the defeated states of Austria, Hungary, Bulgaria and Turkey; treaties imposed on newly recognised states or those with new frontiers, including

¹⁴⁰ D.C. Watt *A History of the World in the Twentieth Century Part One: 1899 - 1918* (London: Pan Books Ltd, 1970) at 321

¹⁴¹ M. Weller 'Breaking Up is Hard To Do' (*New Statesman & Society*, 23 August 1991) 18 at 18

¹⁴² H. Hannum, *supra* note 114 at 6

Czechoslovakia, Greece, Poland, Romania, and Yugoslavia; and treaties or agreements creating special internationalised regimes in the Aaland Islands, Danzig, the Memel Territory, and Upper Silesia. Consistent with the previous attempts to address issues related to self-determination, the Allied Powers and the League of Nations imposed obligations only on defeated states or states otherwise beholden to the major powers.¹⁴³

The territory of the former Austro-Hungarian and Ottoman empires required new political masters, and the principle of self-determination as a means of drawing new 'nation state' boundaries became the vehicle for legitimising the victorious powers' re-division of Europe.¹⁴⁴ The colonies of the defeated powers were transformed into Mandates of the League of Nations and entrusted to the control of the allies.

It was not only the colonies that suffered. In many countries minorities are denied the right of self-determination by the acceptance of the doctrine of majority rule, perhaps with some guarantee of individual rights. Even in America, Australia and Canada, indigenous groups were given no recognition by the settler populations who had been given the right of self-determination.¹⁴⁵ The concept of racial equality was also excluded from the Covenant of the League of Nations.

The colonialist powers called ethnocultural groups in Africa, Asia, America and Australia 'tribes', a concept with racist connotations of primitiveness, while much smaller European communities were regarded as 'nations.' In fact, there is no objective reason to call the few hundred thousand Basques a nation while ten million Ibos, who possess a well defined territory, a language, and a culture, are relegated to the status of a tribe. This was simply a reflection of colonial racism which became a moral rationale for colonial rule. As a

¹⁴³ H. Hannum, *supra* note 114 at 6

¹⁴⁴ H. Hannum, *supra* note 114 at 3

¹⁴⁵ H. Hannum 'Contemporary Developments in the International Protection of the Rights of Minorities' (1991) Volume 66 Number 5 *Notre Dame Law Review* 1431 at 1434-1435

commentator says: 'Enlightened public opinion could accept colonial rule of tribes and yet be faithful to the Wilsonian principle of self-determination of nations'.¹⁴⁶

In addition, the strategy of decolonisation was also used selectively in different variations to deny the right of self-determination and secession. For example, to prevent the right of secession, the Czechs and Slovaks were forced into one state called Czechoslovakia while in Africa many peoples were pushed into states with no regard to ethnic boundaries. On the other hand, many peoples were divided among neighbouring countries such as the Kurds among Turkey, Iran, Iraq and Syria.¹⁴⁷ These strategies were designed to make easy ruling by colonial powers by setting the nation's ethnic groups against each other.¹⁴⁸

Despite the fact that the principle of self-determination has had a place in democratic thought since at least 1789, claimed as a right by 19th and 20th centuries nationalist movements, and socialists and had great popularity during the First World War, there was no legal principle of self-determination under the League of Nations arrangement, nor any substantive political support for developing such a legal principle. In fact such attempts have been opposed by colonialist powers consistently. This was confirmed by the League's Council and its expert advisers in the Aaland Island dispute in 1920-1921 when two bodies were established by the League Council to investigate the claim of islands populated by Swedes to secede from Finland almost simultaneously with Finland's secession from Russia.

The Committee of Jurists in the Aaland Islands case decided in favour of the colonialist powers position that 'the recognition of the principle of self-determination in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations'.¹⁴⁹

¹⁴⁶ B. Neuberger, *supra* note 1 at 24

¹⁴⁷ B. Neuberger, *supra* note 1 at 24

¹⁴⁸ H. Hannum, *supra* note 145 at 1434

¹⁴⁹ H.A. Wilson, *supra* note 112 at 78

In the 20th century, there is also a crucial distinction between colonial self-determination, which is the liberation of Asian or African peoples from European colonial rule, and secessionist self-determination, which represents an Afro-Asian people's aspiration to break away from rule by another Afro-Asian people.

In Africa, the principle of self-determination was first invoked after the First World War. The Pan-African Congress which convened in 1919 in Paris coined the slogan 'Africa for Africans', and in the early 1920s, Egyptian Nationalists demanded independence in the name of national self-determination. But in general, until World War II, the principle of national self-determination was regarded as important for the evolution of a new European order but irrelevant to the colonies of Africa and Asia.¹⁵⁰

As Neuberger points out, '[t]he tension between statist national self-determination and ethnic national self-determination in Africa follows the nineteenth century European pattern of conflict between states (e.g., Austria-Hungary, Czarist Russia, the Ottoman Empire, and Great Britain) and nations (e.g., Italians, Czechs, Serbs, Poles, Greeks, Irish)',¹⁵¹

The national self in Africa is most frequently defined as the former colony in its colonial boundaries. Anti-colonial nationalism was in most cases a struggle for the independence of colonies as territorial units within their colonial boundaries. However, in Africa most of the political boundaries were drawn by Colonial powers and frequently did not have a dominant ethnocultural core nor a common national identity.

¹⁵⁰ B. Neuberger, *supra* note 1 at 5

¹⁵¹ B. Neuberger, *supra* note 1 at 34

3.5 THE CONCEPT OF SELF-DETERMINATION BETWEEN THE TWO WORLD WARS

The principle of self-determination of peoples continued to play an important role in modern political thought. The principle, however, dominated history between the two world wars. During this period the principle was to a large extent implemented in Europe, whereas the consistent opposition of colonial powers prevented its application to colonies, the Mandate system established by the Covenant of the League of Nations was an able attempt to keep control of the three categories of dependent peoples provided for in Article 22 of the Covenant while accepting the idea of the 'sacred trust of civilisation'.

Particularly during the period between the two World Wars, the right of national self-determination was understood by Eastern European nationalist movements as 'nation-states that are dominated by one ethnocultural nation, independent and ruled by its own nation. According to the nationalist movements, national self-determination is compatible with dictatorship as long as it is national.

Between the wars, self-determination was understood as a political principle which applied to 'all peoples' without distinction. The term was used in the following instances:

- (a) A people living as a minority (or even as a majority) group in one state, ruled, however, by another people.
- (b) People living as minority groups in more than one state without their own statehood.
- (c) A people living as a minority group in a state but perceiving itself as part of a neighbouring state.
- (d) A people or nation forced by external influence to live in separate states.

- (e) A people living as a majority (or even as a minority) group within the limits of a territory with a special status under foreign domination.¹⁵²

In all five cases it was required that the respective 'peoples' settle in certain parts of the country where they then formed the majority of the population. The principle of self-determination of peoples relates mainly to ethnic minorities living together within the limits of a given territory inside a pre-existing state or empire.¹⁵³

During the inter-war period there were a number of plebiscites in Europe including Upper Silesia and Schleswig which caused the area to be divided, Humptrup went to Germany, Saed to Denmark, and the Saar to Germany after 15 years of French administration.

3.6 THE SECOND WORLD WAR AND THE CONCEPT OF SELF-DETERMINATION

Self-determination continued to be a major slogan and political principle in international affairs during the Second World War again. On one side there were claims of the right of self-determination from colonies, unsatisfied nations or victims of the First World War, while on the other, it was the 'life jacket' of the colonialist powers and allies in a hypocritical way.

The Atlantic Charter which was endorsed by twenty-six Allied States on 1 January 1942 contained two points relevant to the principle of self-determination. There were to be no territorial changes that did not accord with the freely expressed wishes of the people concerned. The rights of all peoples to choose the form of government under which they

¹⁵² A. Michalska, 'Rights of Peoples to Self-determination in International Law' in W. Twining (Ed), *supra* note 126 at 75

¹⁵³ A. Michalska, *supra* note 152 at 76

would live would be respected, sovereign rights and self-government being restored to those who had been forcibly deprived of them.

The Atlantic Charter of 14 August 1941 formulated by Churchill and Roosevelt was an elaboration of Roosevelt's January 1941 '4 Freedoms' which affirmed the right of freedom of speech and expression, freedom of worship, freedom from want and freedom from fear.

The Occupying powers' attitude towards the principle of self-determination was very clearly reflected in Churchill's speech in the House of Commons in September 1941, where he stated:

'At the Atlantic meeting we had in mind primarily the extension of the sovereignty, self-government and national life of the states and nations of Europe now under the Nazi yoke and principles which should govern any alterations in the territorial boundaries of countries which may have to be made. That is a quite separate problem from the progressive evolution of self-governing institutions in regions whose peoples owe allegiance to the British crown...'¹⁵⁴

When the Soviet Union proposed an amendment which included the words '... respect for the principle of equal rights and self-determination of peoples' at the San Francisco consultation, it was opposed by Western Colonialists.¹⁵⁵ In fact, the Belgian delegate strongly opposed even the reference to such a principle.¹⁵⁶

Ultimately the concept of self-determination was incorporated into the United Nations Charter Article 1(2) among one of the four specified purposes of the United Nations at the insistence of the Soviet Union, albeit in truncated form.¹⁵⁷ Article 1(2) states, '[t]o developed friendly relations among nations based on respect for the principle of equal

¹⁵⁴ H.A. Wilson, *supra* note 112 at 58

¹⁵⁵ A. Cassese, *supra* note 135 at 161

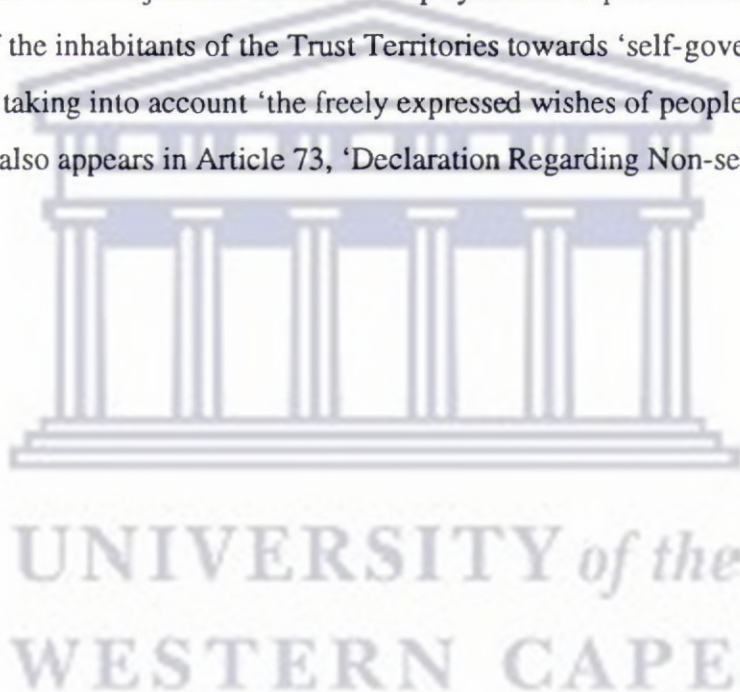
¹⁵⁶ A. Cassese, *supra* note 135 at 161

¹⁵⁷ I.G. Shivji, *supra* note 126 at 34; D. C. Watt, *supra* note 140 at 321

rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace’.

Although the political origins of the modern concept of self-determination can be traced back to the American Declaration of Independence of 1776, most of the commentators agree that the principle of self-determination of peoples became a part of modern international law after been incorporated into the United Nations Charter.

The right of self-determination also appears indirectly in Article 76 of the Charter which provides that one of the objects of the trusteeship system is to promote the progressive development of the inhabitants of the Trust Territories towards ‘self-government or independence,’ taking into account ‘the freely expressed wishes of people concerned.’ This same idea also appears in Article 73, ‘Declaration Regarding Non-self-Governing Territories’¹⁵⁸



¹⁵⁸ A. Cristescu *supra* note 128 at 471

4. THE DEVELOPMENT AND STATUS OF THE CONCEPT OF SELF-DETERMINATION IN MODERN INTERNATIONAL LAW

4.1 DEVELOPMENTS WITHIN THE REALM OF THE UNITED NATIONS

Although many scholars agree that the right of self-determination became a part of international law after its inclusion in the UN Charter, it is evident from the discussion of the development and origins of the right¹⁵⁹ that it has in fact existed in theory and in practice for centuries. Its inclusion in the UN charter merely signalled its recognition at a universal level by this international organisation.

The United Nations Charter, which was signed on 24 October 1945, was the first authoritative legal document to uphold the principle of self-determination.¹⁶⁰ However, the legal status of the principle of self-determination has long been the subject of controversy in the UN and the formulation which was eventually included in the Charter was the product of compromise between the various role-players.¹⁶¹ In the eyes of Great Britain, France, Belgium, the USA and the Netherlands, the recognition of equal rights and self-determination of people as a *right* would have meant the end of their colonies and thus the victory of socialism over capitalism, the triumph of the collective self over the liberal individualist self. On the other hand, anti-colonialist USSR, and African, Asian, Latin American as well as East European States urged the acceptance of self-determination as a legal principle imposing an obligation on colonial powers. For fear of alienating anti-colonialist USSR and its allies from the United Nations, the principle of equal rights and self-determination of people was accepted as a *political principle* rather than a *right* - a mere standard of achievement towards which member States should strive as an ideal, but not as a matter of legal obligation. As Arnold Forster¹⁶² aptly remarks:

¹⁵⁹ Cf Chapter 2 in general

¹⁶⁰ A. Cassese, *supra* note 135 at 138 and see in particular articles 1(2) and 55 of the UN Charter

¹⁶¹ A. Cassese, *supra* note 135 at 138

¹⁶² M. Arnold-Forster *The World at War* (London: Thames Methuen - Mandarin, 1989) at 229

'The Alliance that won the war was an improbable group of nations. Communist Russia, capitalist America, and imperialist Britain were not natural friends. Only Hitler could have brought them together.'

The deliberately ambiguous and ambivalent formulation of the principle of self determination in the UN instruments¹⁶³ made it possible for opposite sides to justify their respective positions in many international conflicts in the history of the United Nations throughout the post-1945 and decolonization era. In the United Nations Charter, Article 1(2) lists as one of the four specified purposes of the UN:

'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.'

Art 55 sets out certain obligations assumed by the UN relating to the promotion of economies, education, culture and the observance of human rights 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.'

The right of self-determination of peoples has been supported by the Asian, Eastern European, Latin American, African and newly independent countries at regional international organisations and conferences as well as at the United Nations. These countries have also consistently supported the outlawing of colonialism as well as the elevation of self-determination from a principle to a right. This movement was opposed by colonial and ex-colonial powers as well as their allies. The colonialists interpreted those

¹⁶³ Cf Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Declaration on the Granting of Independence to Colonial Countries and Peoples, International Covenant on the Elimination of all Forms of Racial Discrimination, Declaration on the Granting of Independence to Colonial Countries and Peoples etc.

attempts as interference with the domestic jurisdiction of the country involved. A Russian amendment to the Universal Declaration of Human Rights declaring that 'every people and every nation has the right to national self-determination,' was rejected.¹⁶⁴ The Universal Declaration of Human Rights made no references to minority rights either. The issue of minority rights was regarded as an issue of individual rights.¹⁶⁵

Although the colonialist powers managed to slow down the process of the application of self-determination to colonial and other dependent territories, ultimately the socialist view won the day.¹⁶⁶ Umozurike remarks that 'with the signing of the Charter, the international community turned away from the protection of the Empires and toward the final "liquidation" of colonialism in the interest of humanity at large.'¹⁶⁷

Western opposition to the right of collective self-determination of people in the individualist liberal context - particularly to exclude the application of the right of self-determination of peoples to the colonies - lost further ground when the General Assembly in resolution 421D(V) of 4 December 1950 recognised the 'right of peoples and nations to self-determination as a fundamental human right'. In Resolution 637A(VII) of 16 December 1952, the General Assembly, recognised that 'the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights'.¹⁶⁸

The growing support for the right of peoples to self-determination was affirmed at the 1955 Bandung Conference of Afro-Asian Countries where it was declared that,

¹⁶⁴ H. A. Wilson, *supra* note 112 at 62

¹⁶⁵ J. Crawford 'Some Conclusions' in J. Crawford (Ed) *The Rights of Peoples* (Oxford: Clarendon, 1988) 159 at 161

¹⁶⁶ A. Cassese, *supra* note 135 at 140

¹⁶⁷ U.O. Umozurike, *supra* note 100 at 163

¹⁶⁸ 'Right of Peoples and Nations to Self-Determination' in *United Nations Action in the Field of Human Rights* (New York: UN Publication, 1988) 54 at 54

'the subjection of peoples to alien subjugation, domination and exploitation, constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.'¹⁶⁹

In resolution 1514(XV) of 14 December 1960, the United Nations General Assembly proclaimed 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations' and adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples.¹⁷⁰ This was the first significant step towards developing the concept of self-determination contained in Articles 1 and 55 of the UN Charter. It was adopted without any dissenting votes but there were nine significant abstentions: the USA, Great Britain, France, Belgium, Portugal, South Africa, Australia, Dominican Republic and Spain.¹⁷¹ It was unequivocally declared that all peoples have the right to self-determination but accentuated in particular the self-determination of peoples in the colonial sphere. Great emphasis was also placed on the need for territorial integrity of non-self-governing peoples and the duty to abstain from interfering in the internal affairs of States.¹⁷² The Declaration states that:¹⁷³

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

¹⁶⁹ H.A. Wilson, *supra* note 112 at 65

¹⁷⁰ *United Nations Action in the Field of Human Rights*, *supra* note 168 at 55

¹⁷¹ A. Cassese, *supra* note 135 at 141

¹⁷² A. Cassese, *supra* note 135 at 141

¹⁷³ *United Nations Action in the Field of Human Rights*, *supra* note 168 at 55

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed, or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States and respect for the sovereign rights of all peoples and their territorial integrity.

A new economic dimension was introduced into the concept of self-determination with the adoption of resolution 1803 (XVII) on 'Permanent Sovereignty over Natural Resources'

by the United Nations General Assembly on 14 December 1962.¹⁷⁴ In terms of article I(1) of the resolution,

‘[t]he rights of *peoples* and *nations* to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the *people of the State concerned*’ (emphasis added).

It is important to note that article I(2) of the resolution provides that the exploration, development and disposition of such resources, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable. The resolution also specifically provides that any violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations.¹⁷⁵

The concept of self-determination was further developed by its inclusion in the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights,¹⁷⁶ adopted in resolutions of the United Nations General Assembly on 16 December 1966 which came into force on 3 January 1976 and 23 March 1976 respectively.¹⁷⁷ It was felt that the right of self-determination should be set out in an international treaty since the legal standing of this instrument is greater than that of a General Assembly resolution.¹⁷⁸ The identically worded Art. 1 of both Covenants establishes that:

¹⁷⁴ I. Brownlie (Ed) *Basic Documents in International Law* (Oxford: Clarendon Press, 1983; 3rd edition) 232 - 234

¹⁷⁵ Cf article I(7) of the resolution

¹⁷⁶ See in general L. Henkin (Ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981)

¹⁷⁷ H.A. Wilson, *supra* note 112 at 75

¹⁷⁸ A. Cassese, *supra* note 135 at 141 - 142

- (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
- (3) The state Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.¹⁷⁹

According to Cristescu¹⁸⁰ the inclusion of the concept of self-determination in Art. 1 of the Covenants gave it the characteristic of a fundamental human right '.... or more accurately, that of a source or essential prerequisite for the existence of individual human rights, since these rights could not genuinely be exercised without the realisation of the (collective) right of self-determination.' Thus the inclusion of the right to self-determination emphasises that there is little sense in recognising the rights and freedoms of individuals if the community in which the individuals live is not free.¹⁸¹

The next pronouncement of the General Assembly of the United Nations which upheld the right of self-determination is the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (The Declaration on Friendly Relations), which was adopted by consensus on 24 October 1970. It proclaimed seven principles of

¹⁷⁹ *United Nation Action In the Field of Human Rights, supra* note 168 at 55-56

¹⁸⁰ A. Cristescu, *supra* note 128 at 472

¹⁸¹ A. Cassese, *supra* note 135 at 142

International Law, one of which was the principle of equal rights and self-determination of peoples. Several Western States had, until 1970, consistently abstained on resolutions recognising a right to self-determination and the unanimous adoption of this Declaration marked the first departure from this tendency.¹⁸² For the first time the Western powers as a whole recognised self-determination as a legal right and its denial as a violation of the Charter.¹⁸³

The fifth principle proclaimed in Part I of the Declaration on Friendly Relations contains the most authoritative and comprehensive formulation thus far of the principle of self-determination:¹⁸⁴

'By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.'¹⁸⁵

It was emphasised in the Declaration that self-determination is the right of a people. It was also made clear that self-determination has a universal character and relates to all peoples. In paragraph 4 of the fifth principle of the Declaration an innovative mechanism is created to allow, for the first time, the right of self-determination to be adapted to different political modalities:

'The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political

¹⁸² H.A. Wilson, *supra* note 112 at 71

¹⁸³ A. Cassese, *supra* note 135 at 145

¹⁸⁴ A. Cristescu, *supra* note 128 at 472

¹⁸⁵ I. Brownlie, *supra* note 174 at 41 - 42

status freely determined by a people constitute modes of implementing the right of self-determination.’¹⁸⁶

Other aspects of the right of self-determination have also been developed after the adoption of the Covenants. In particular, the ‘Declaration on the Establishment of New International Economic Order’ (Resolution 3201 (S-VI) of 1 May 1974) insists on this right as being one of the bases of the new order and proclaims the right of every country to adopt the economic and social system it deems the most appropriate for its own development and the permanent sovereignty of every state over its natural resources and all economic activities.

Besides the United Nations resolutions and declarations relating to the right of self-determination of peoples, other instruments and organisations on regional international level (like the Helsinki Declaration of 1975 and the Organisation of African Unity), and on a transnational level (like the Algiers Declaration of the Rights of Peoples of 1976), exist which deals with self-determination.

4.2 DEVELOPMENTS AT REGIONAL INTERNATIONAL LEVEL

4.2.1 THE HELSINKI DECLARATION

On 1 August 1975 the Final Act of the Conference on Security and Co-operation in Europe (CSCE) was adopted in Helsinki by representatives of 35 states, including the United States and the USSR. Germany, which was at the time divided into two sovereign States, urged the inclusion of a principle relating to self-determination in the Helsinki Declaration, the main purpose of which was to leave open the possibility of the future reunification of the two Germanys. The Foreign Minister of the Federal Republic of Germany expressed their sentiments as follows at the opening of the Conference in Helsinki during 1973:

¹⁸⁶ Brownlie, *supra* note 174 at 42

'...it is the political aim of the Federal Republic of Germany to help create a state of peace in Europe in which the German nation can regain its unity in free self-determination.'¹⁸⁷

The Final Act contains a declaration of principles under the heading 'Questions Relating to Security in Europe' and the text of the principle relating to self-determination, reads as follows:

'The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.'

Although the Helsinki Declaration is not a treaty instrument, it constitutes an important statement of intent and constitutes evidence of acceptance of pertinent principles of customary international law.¹⁸⁸

¹⁸⁷ A. Cassese, *supra* note 135 at 149

¹⁸⁸ I. Brownlie, *supra* note 127 at 578

The Helsinki Declaration emphasises the universal character of the concept of self-determination with a broader meaning within the context of internal and external self-determination than that embodied in the United Nations instruments. According to the Declaration, the principle of self-determination applies to all peoples regardless of whether or not they live in a sovereign and independent State. The word 'always' and the phrase 'when and as they wish' are meant to convey the idea that the right of self-determination is a continuing right. It is a right which may be asserted by people on a continuing basis and it keeps its validity even after a people has chosen a certain form of government or a certain international status.¹⁸⁹ With the adoption of the Declaration on Friendly relations the Western powers as a whole had already recognised self-determination as a legal right. Therefore, the assertion of the right of self-determination no longer posed such a great threat to the colonialist powers as was previously the case, in view of the fact that most of the colonies had already achieved independence at this stage. The colonial powers saw their internal political and ethnic problems as a matter of internal self-determination which could be solved autonomously via the exercise of democratic rights.

4.2.2 ORGANISATION OF AFRICAN UNITY

The Organisation of African Unity was set up in May 1963 in Addis Ababa by the heads of 32 independent African countries as an intergovernmental organisation. In 1981 the organisation's main body, the Assembly of heads of state and government, unanimously adopted the African Charter of Human and Peoples' Rights. The Charter entered into force on 21 October 1986.¹⁹⁰

The relevant portions of Chapter 1, which deals with human and peoples' rights, provide as follows:¹⁹¹

¹⁸⁹ A. Cassese, *supra* note 135 at 149-50

¹⁹⁰ A. Cassese *Human Rights in a Changing World* (Oxford: Polity Press, 1990) at 203

¹⁹¹ J. Crawford, *supra* note 115 at 198

Article 19

'All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Article 20

All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen

Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.

Article 21

All peoples shall freely dispose of their wealth and natural resources. The right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it...'

4.3 DEVELOPMENTS AT TRANSNATIONAL LEVEL

4.3.1 THE ALGIERS DECLARATION OF THE RIGHTS OF PEOPLES

Another expression of the Rights of Peoples is embodied in the Universal Declaration of the Rights of Peoples adopted on 4 July 1976 at a conference held in Algiers. The product of the conference, commonly known as the Algiers Declaration, does not reflect the opinions and positions of governments, as it was formulated by an *ad hoc* gathering of lawyers, political

scientists, politicians, and others,¹⁹² having no governmental status or accountability to their respective governments. As a result, it does not carry the same weight, nor does it have the same legal standing as resolutions of the United Nations General Assembly or the Helsinki Declaration.¹⁹³ Falk describes it as ‘... a framework of rights asserted by and for the peoples of the world over and against the claims and activities of governments, multinational corporations, and international institutions.’¹⁹⁴ As such it simply reflects the hopes and ideals of individuals, setting forth the realities of the situation without any of the practical constraints of the sorts operative in the realm of the United Nations. According to Cassese, the Algiers Declaration is more radical and closer to the real needs of people because it is free from governmental compromise.¹⁹⁵ It has, however, been criticised as a work of high idealism written at such high levels of abstraction that it affords little assistance with practical solutions to problems relating to group rights.¹⁹⁶

The preamble of the Algiers Declaration identifies imperialism as the biggest threat to the freedom of people, thereby linking the anti-imperialist struggle directly to the rights of people.¹⁹⁷ The gist of the document in its entirety, however, shows that the ultimate enemy is any form of oppressive and authoritarian government. Articles 5 and 6 reaffirm the anti-colonialist principles of the United Nations whilst article 6 goes even further by sanctioning the right of peoples to break free from any colonial or foreign domination whether direct or indirect.¹⁹⁸ Having taken a firm stance against any form of oppression of peoples, the Algiers Declaration equates the political oppression of a people with the denial of its right of self determination in article 7:

¹⁹² I. Brownlie, *supra* note 115 at 1

¹⁹³ A. Cassese, *supra* note 135 at 153

¹⁹⁴ R. Falk *Human Rights and State Sovereignty* (New York: Holmes & Meier Publishers, Inc., 1981) at 192

¹⁹⁵ A. Cassese, *supra* note 135 at 153

¹⁹⁶ I. Brownlie, *supra* note 115 at 11

¹⁹⁷ R. Falk, *supra* note 194 at 193

¹⁹⁸ A. Cassese, *supra* note 135 at 153

'Every people has the right to have a democratic government representing all citizens without distinction of race, sex, belief or colour, and capable of ensuring effective respect for the human rights and fundamental freedoms for all.'

In terms of the 1970 Declaration on Friendly Relations¹⁹⁹ the United Nations required that a government should be representative of the whole people belonging to the territory without discriminating on the basis of race, colour and creed. According to the Algiers Declaration this is no longer enough. The government must also be democratic and able to guarantee effectively the free exercise of human rights. In the circumstances it is no longer possible for governments to claim that because they themselves are representative, they are not denying self-determination. Governments are therefore no longer able to use the claim that they are representative as a convenient defence if they deny human rights and fundamental freedoms. According to Cassese,²⁰⁰ the respect for or denial of human rights thus becomes indicative of whether or not a government is respecting the peoples' right to 'internal' self-determination.

According to the Declaration on Friendly Relations,²⁰¹ self determination is a basic precondition for the enjoyment of the rights of individuals, and the alien domination of a peoples constitutes a violation of the right of self-determination and severely impairs the enjoyment of individual rights and freedoms. The Algiers Declaration goes one step further and unequivocally states that the systematic denial of the rights and fundamental freedoms of members of a people infringes that people's right of self-determination.

One of the features of the Algiers Declaration worth noting is the fact that the draftsmen were under no obligation to act in the interest of governments - they could freely speak out in favour of peoples. Contrary to instruments of the United Nations, sovereignty of the State and

¹⁹⁹ Paragraph 7 of principle 5 (i.e. the principle of equal rights and self-determination)

²⁰⁰ A. Cassese, *supra* note 135 at 154

²⁰¹ Paragraph 2 of principle 5 (i.e. the principle relating to equal rights and self-determination of peoples)

protection of territorial integrity was not of paramount importance.²⁰² The secession of minorities is allowed and article 21 provides that these rights of minorities:

‘shall be exercised with due respect for the community as a whole and cannot authorise impairing the territorial integrity and political unity of the State, provided the State acts in accordance with all the principles set forth in this Declaration.’

Should a State therefore not act in accordance with the principles contained in the Declaration, the secession of a minority would become permissible. Systematic oppression of minorities and the denial of the rights and freedoms of the members of the minority group could therefore legitimately give rise to the impairment of territorial sovereignty.²⁰³

Another significant aspect of the Algiers Declaration is the fact that it authorises the use of force by peoples whose fundamental rights are seriously disregarded. Article 28 authorizes peoples ‘... whose fundamental rights are seriously disregarded to enforce them, especially by political or trade union struggle and even, in the last resort, force.’ Article 29 provides that ‘liberation movements shall have access to international organizations and their combatants are entitled to the protection of the humanitarian law of war.’

Provision is also made for the intervention of third parties to guarantee self-determination. Article 22 provides that ‘...any disregard for the provisions of this Declaration constitutes a breach of obligations towards the international community as a whole’ whilst Article 30 places a duty upon all members of the international community to assist in the re-establishment of fundamental rights of peoples when they are seriously disregarded. Denial of the self-determination of a people by a particular State therefore constitutes a violation of the right of that people as well as the right of all members of the international community.

²⁰² A. Cassese, *supra* note 135 at 155

²⁰³ A. Cassese, *supra* note 135 at 156

As the Algiers Declaration emanates from a group of individuals without any governmental status, it does not have the same legal or political force and significance as, for example, the Helsinki Declaration. In the circumstances it does not directly impact on the general rules of international law on self-determination. However, its importance lies in the indirect contribution which it makes towards spreading new ideas about self-determination. Although these ideas may presently only have moral and political persuasive value, they awaken and strengthen in all peoples a greater awareness of their fundamental rights and may eventually influence world public opinion.

4.4 CONCLUDING REMARKS

According to Aureliu Cristescu, the Special Rapporteur for the United Nation Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Both the UN and the majority of authors are alike in maintaining that the principle of self-determination is a part of modern international law. 'The principle has been confirmed, developed and given more tangible form by a consistent body of States practising and has been embodied among "the basic principle of international law" in the Friendly Relations Resolution.'²⁰⁴

Brownlie shares the same idea and states that: 'There is now sufficient evidence to show that the right of self-determination is a right accepted as customary international law. This right has been upheld in many international and regional instruments, from Article 1(2) of the UN Charter (as being one of the purposes of the UN) to Part VII of the Helsinki Final Act 1975 and in Article 20 of the African Charter on Human and Peoples' Rights'.²⁰⁵

On the other hand in contrast to the Committee of Jurists in the Aaland Islands case,²⁰⁶ the International Court in the Western Sahara case in 1975 decided that 'the application of the

²⁰⁴ A. Cristescu, *supra* note 128 at 473

²⁰⁵ I. Brownlie, *supra* note 127 at 594

²⁰⁶ H.A. Wilson, *supra* note 112 at 50; Cf also paragraph 3.4 *supra* p 52

right of self-determination requires free and genuine expression of the will of the peoples concerned'.²⁰⁷

Since its inclusion as an ambiguously formulated principle in the United Nations Charter, the concept of self-determination has developed as part of modern international law, and has now been widely accepted as a collective right of peoples which is a prerequisite for the existence of individual human rights.



²⁰⁷ H.A. Wilson, *supra* note 112 at 78

5. CLAIMANTS OF THE RIGHT OF SELF-DETERMINATION

Having examined the historical background of the Kurdish people as well as the historical development and varying interpretations of the concept of the right of self-determination of peoples, it is now appropriate to examine the application of the right of self-determination of peoples to the Kurdish people.

As stated earlier,²⁰⁸ any study of the application of the right of self-determination of peoples to the Kurdish people, would first of all require an examination of each of the constituent elements of the concept within the context of modern international law, viz. who is the *self* or the *peoples* to whom the right applies and what is to be determined?

5.1 THE CONCEPT OF PEOPLE

Simply understood, the 'right of self-determination of peoples' in international law addresses the right of 'peoples.'²⁰⁹ As the concept of 'peoples' refers to a kind of collectivity or group of human beings,²¹⁰ the right to determine their collective actions rests in that particular people and not in a state.²¹¹ The concept entails the right of a particular people to carry out its chosen activities free from outside interference, with due respect for the rights of other peoples, and it operates *vis-a vis* the State which administers and controls that people at any particular time²¹² or against any other group of peoples.²¹³ It is also generally accepted that this right does not vest in any government either.²¹⁴

²⁰⁸ Cf Chapter 2

²⁰⁹ J. Crawford, *supra* note 165 at 164

²¹⁰ D. Makinson 'Rights of Peoples: A Logician's Point of View' in J. Crawford (Ed) *The Rights of Peoples* (Oxford: Clarendon, 1988)69 at 73

²¹¹ R. McCorquodale 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857 at 868

²¹² J. Crawford, *supra* note 165 at 164

²¹³ R.T. De George 'The Myth of the Right of Collective Self-determination' in W. Twining (Ed) *Issues of Self-determination* (Aberdeen: Aberdeen University Press, 1991) at 3

²¹⁴ J. Crawford, *supra* note 165 at 164; R. McCorquodale, *supra* note 211 at 868

Throughout history the concept of 'people' has been interpreted differently by different collectivities or groups of peoples. There are certain subjective and objective reasons that make it difficult to formulate a common binding definition of 'nation' and 'people'. Different collectivities or groups of peoples have different criteria for the purpose of defining the concept, and these criteria are shaped by the particular collectivity or group of people's unique demands or needs. As a result, the concept of 'people' and 'nation' do not yet have a common binding definition for the purpose of establishing who may exercise the right of self-determination.

Despite this uncertainty, Brownlie²¹⁵ is of the opinion that the concept does have a core of reasonable certainty for the purpose of applying the right of self-determination, namely

'...the right of a community which has a distinct character, to have this character reflected in the institutions of government under which it lives.'

He adds that the concept of 'distinct character',

'...depends on a number of criteria which may appear in combination. Race or nationality is one of the most important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality may evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long-existing national identities would be negated on academic grounds - such as, for example, the United States.'

²¹⁵ I. Brownlie, *supra* note 115 at 5

In the case of the United States it is obvious that the application of purely ethnic criteria will disqualify the mainly settler communities from application of the right of self-determination. On the other hand, if one looks at the composition of the institutions of government of certain countries, it becomes obvious that the existence of many indigenous peoples in those countries are completely negated by the governments under which they live. This is the case with the indigenous peoples of the United States of America, Australia, Canada, New Zealand and former racist South Africa as well as the Kurds in Turkey, Iran and Syria and many other countries.

As a result of the fact that Americans cannot be categorised as a nation on the basis of ethnic, religious or racial grounds, they are inclined to favour a definition of 'people' as a 'community of organisations of life and of tradition'²¹⁶ for the purpose of applying the right of self-determination. According to Hans Kohn, '...the American concept of national self-determination is based on democratic rather than purely national claims.'²¹⁷

According to the liberal democratic school, the 'nation' is defined by territory and not according to any ethnocultural criteria. 'Peoples' therefore consists of 'territorial entities' and not 'ethnocultural entities'.²¹⁸ The Germans, on the other hand, who have a more homogenous population, favours the definition of the 'Volk' as a 'community of blood and of origin.' The German nationalists preferred national freedom and sovereignty to the Western democracy.²¹⁹

Most of the nineteenth century European nationalists described 'historical national self' as a guiding principle for the purpose of applying the right of self-determination. The 'historical national self' contains some of the following characteristics:

²¹⁶ M. Pomerance *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff, London 1982) at 1-2

²¹⁷ B. Neuberger, *supra* note 1 at 12

²¹⁸ B. Neuberger, *supra* note 1 at 12

²¹⁹ B. Neuberger, *supra* note 1 at 13

1. The nation as a historical personality is a community linking past, present and future generations which have done great things together and has common memories, sacrifices, glories, afflictions and regrets.
2. For the nationalists there must be a connection between the community and territory in a historical context. For the nationalists 'you cannot install in a people a sense of kinship and brotherhood without attaching them to a place they feel theirs, a homeland that is theirs by *the right of history*.'²²⁰

The historical definition of the national self was not only characteristic of nationalists of all shades and persuasions but was also shared by non-nationalists like Hegel, Acton and Marx.²²¹ Stalin defined a 'nation' as a 'historically evolved, stable community arising on the basis of a common language, territory, economic life and psychological make-up manifested in a community of culture'.²²²

Another factor which complicates the formulation of a definition of 'peoples' is the meaning attached to the concepts of 'indigenous peoples' and 'minorities'. Many states fear that identifiable minority groups or indigenous peoples within their territories might claim the right of self-determination and it is this fear that prevents the formulation of a clear definition of the concepts of 'indigenous peoples', 'minorities' and 'peoples'. Should a clear definition for these concepts be formulated, those who may claim the right of self-determination will immediately be identifiable.

Brownlie is of the opinion that the reference to 'nationalities', 'peoples', 'minorities' and 'indigenous populations' involve essentially the same idea'.²²³ However, Bhala disagrees with Brownlie as he is of the opinion that the concepts of 'nation' and 'indigenous' differ from the Anglo-American liberal definition of 'people'. In this context he explains that:

²²⁰ B. Neuberger, *supra* note 1 at 42

²²¹ B. Neuberger, *supra* note 1 at 42

²²² H.B. Davis, *supra* note 119 at 71

²²³ I. Brownlie, *supra* note 115 at 5

'The right to self-determination first refers to the colonised "peoples". It refers to the "indigenous people" of the territory where the self determination is to be exercised. The right belongs to "peoples" who were deprived of it. Under the colonisation it is the indigenous self that suffered, the other selves are mere transplants helping the colonial power in advancing her interests and in suppressing the indigenous people.'²²⁴

It appears that Bhala's argument is supported in the Declaration of Principles of Indigenous Rights of 1984 which was drafted by the World Conference of Indigenous Peoples (WCIP).²²⁵ The Declaration, inter alia, provides as follows:

Principle 1

'All indigenous peoples have the right of self-determination...'

Principle 2

'All states within which an indigenous people lives shall recognise the population, territory and institutions of the indigenous people.'²²⁶

The Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo, regards the principle of 'self-perception' as fundamental in defining 'indigenous populations'. According to him, 'indigenous communities, peoples and nations' are

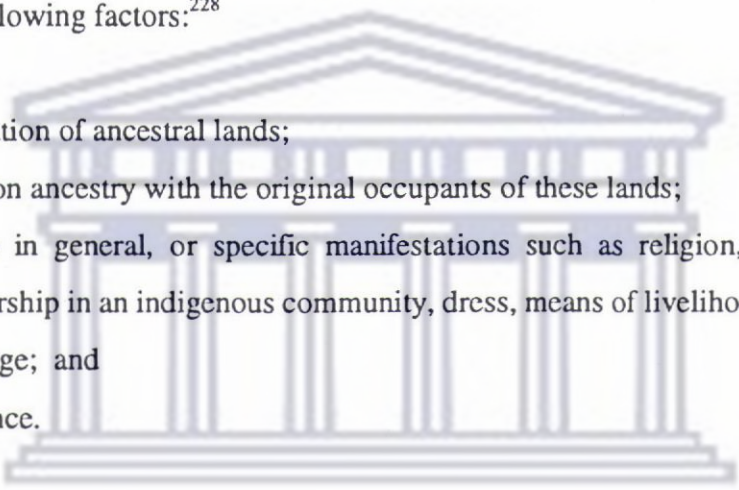
²²⁴ R. S. Bhala 'The Right of Self-Determination in International Law' in William Twining (Ed) *Issues of Self-Determination* (Aberdeen: Aberdeen University Press, 1991) at 99

²²⁵ WCIP is a confederation of indigenous organisations from various countries. See also J. Crawford, *supra* note 115 at 205

²²⁶ J. Crawford, *supra* note 115 at 205

'...[t]hose which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.'²²⁷

According to Martinez Cobo, 'historical continuity' may evidence itself in any one or more of the following factors:²²⁸

- 
- (a) Occupation of ancestral lands;
 - (b) Common ancestry with the original occupants of these lands;
 - (c) Culture in general, or specific manifestations such as religion, a tribal system, membership in an indigenous community, dress, means of livelihood and life-style;
 - (d) Language; and
 - (e) Residence.

This definition contains many of the characteristics referred to in the definition of 'historical national self'.²²⁹

Self-identification was also adopted as a fundamental criterion for determining the groups to which the 1989 ILO Convention applies. In Article 1 of the convention 'indigenous peoples' are defined as those who are regarded as such

'...on account of their descent from the *populations* which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or

²²⁷ N. Lerner *Group Rights and Discrimination in International Law* (Dordrecht: Martinus Nijhoff Publishers, 1991) at 100

²²⁸ N. Lerner, *supra* note 227 at 101

²²⁹ *Supra* paragraph 5.1 at 77

colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’ (emphasis added)

It is worth noting that several governmental representatives preferred the use of the word ‘populations’ rather than ‘peoples’ as they felt that the use of the word ‘peoples’ was likely to be construed as implying rights leading to secession.²³⁰ In this regard Article 1(3) of the Convention states that the use of the term ‘peoples’ in the Convention,

‘... shall not be construed as having any implications as regards the rights which may attach to the term under international law.’

It is important to note that the acceptance of the statist’ or liberal democratic school’s definition of ‘people’ or ‘nation’ as ‘territorial entities’ and not ‘ethnocultural entities’ has the consequence to legitimate an oppressive government under the guise of democracy, which, from oppressed peoples’ point of view is even more dangerous than any dictatorship or tyranny. Instead of consolidating geographical areas and the inhabitants thereof, this approach encourages and legitimises expansionism and colonialism.

The colonisation of America by the British empire is a clear example. The British claimed a right over those territories which they managed to occupy. Once the colonialists established a settler majority and managed to demarcate the borders of the State, the indigenous and other ethnic groups were no cause for concern. Under the guise of individual equality, non-discrimination, democracy and majority rule, the indigenous people were doomed to be ruled by a foreign settler majority. This colonial mentality was legitimised during the League of the Nations era.

If this ideology is followed through to its logical conclusion, its practicality and objectiveness can be tested with the following question: If Hitler persisted with his forced

²³⁰ N. Lerner, *supra* note 227 at 102

occupation of foreign territories through burning, gassing, killing and forced emigration of non-Arians until such time as the Germans became a majority within the occupied territories he would have been able to claim the right of self-determination and even have a plebiscite to that effect which would have received majority support. Would the supporters of the ideologies of the liberal democratic school have been content to accept this and would they have regarded themselves as part of the German nation or not? Obviously not. In 1943 Churchill stated that

'the principle of self-determination upheld by the Atlantic Charter did not apply to the colonies but only aimed at restoring the sovereignty and self-government of the European States and nations that had been *under the Nazi Yoke*'²³¹ (emphasis added).

As mentioned before,²³² the protection of minorities only applied selectively to certain groups during the League of the Nations era. The victorious colonial powers were excluded from such obligations. The League of Nations did not recognise any collective or group rights of indigenous peoples and rejected any such claims.²³³ In 1926 a British-American arbitration panel affirmed that

'tribes were not legal units of international law and that the agreements concluded with aboriginal groups were not treaties according to international law, but unilateral acts pertaining to domestic law.'²³⁴

The Permanent Court of International Justice also did not recognise any international personality of aboriginal tribes.²³⁵ However, aboriginal peoples persisted with their claims for the right of self-determination, the exclusion of jurisdiction asserted by States over

²³¹ A. Cassese, *supra* note 135 at 161

²³² Cf Chapter 2 in general

²³³ N. Lerner, *supra* note 227 at 99

²³⁴ N. Lerner, *supra* note 227 at 100

²³⁵ N. Lerner, *supra* note 227 at 100

indigenous nations or peoples, except in accordance with their freely expressed wishes, the right to permanent control and enjoyment of historical territories and the right to restitution of lands. Certain indigenous peoples motivated their claims on the ground that discovery, conquest, or settlement, and unilateral legislation can never be a legitimate basis for States to claim or retain the territories of indigenous nations or peoples.²³⁶

It is important to note that countries such as Canada, Australia, New Zealand and Latin America fell prey to colonial powers analogous to the American experience. Countries such as South Africa, Rhodesia and Namibia on the other hand, are examples of territories which were colonised, but where the colonialists were unsuccessful in establishing settler majorities. The irony involved is that the latter countries' illegitimacy was a product of mass consciousness and revolt against the settler regimes as well as leniency on the part of these regimes towards the natives. Although the cruelties of apartheid were truly abhorrent, the indigenous people lived through it, to eventually triumph democratically against the usurpers, whereas in those commendable western democracies of the USA, Canada, Australia, New Zealand etc., the natives were exterminated in such numbers that they could never muster enough votes to be noticed. In this regard one can rightly ask oneself when last there was a native American President of the USA.

A definition of 'people' according to 'colonial territorial entities' for purposes of claiming the right of self-determination, is also unacceptable. It is as artificial as the liberal democratic school's 'territorial entities' but it does not include elements of 'liberalism' or 'democracy'. Another important difference is the fact that there is no majority of settlers or 'discovery', but rather *conquest*, *genocide* and the *unilateral legislation* of the settler mission in an attempt to civilise the primitive aborigines and native tribes.

The necessity on the part of the so-called civilised colonial powers to '[improve] the conditions and well-being of the aborigines, or native tribes' was dealt with at the Berlin

²³⁶ N. Lerner, *supra* note 227 at 104

(1884 - 85) and Brussels (1889 - 90) Conferences on Africa.²³⁷ At the end of World War I this was affirmed by the League of Nations and a doctrine was developed based on the idea of 'trusteeship'. According to Article 22 of the League of Nations Covenant, the 'well-being and development' of 'peoples not yet able to stand by themselves under the strenuous conditions of the modern world', was seen as a 'sacred trust of civilisation'. The members of the League of Nations further undertook to '...secure just treatment of native inhabitants of territories under their control.' in terms of Article 23 of the Covenant.²³⁸ Ultimately this is rank paternalism.

Another approach to the definition of 'people' is to limit the peoples who are entitled to the right to only 'the peoples of a State in their entirety'.²³⁹ This approach is in practice, however, not much different from the liberal democratic concept of 'people'. If the right of self-determination did in fact only belong to 'the peoples of a State in their entirety', then it would not be possible to speak of the right of the 'peoples' of the Soviet Union or Yugoslavia to self-determination. State practice has in fact seen the right of self-determination applied to situations where the 'peoples' concerned have never been recognised as a State before, such as the Czech Republic and Slovakia (which formed part of the former state of Czechoslovakia) as well as Bangladesh (which formed part of Pakistan). The right has also been applied where the peoples concerned formed only a part of the inhabitants of a State, such as the Palestinians.²⁴⁰ According to McCorquodale state practice is not conclusive in this aspect of the right of self-determination, as

'... recognition of a people as a "people" is ultimately a political decision, which may not accord with the legal position, and those entitled to the benefit of the protection of a right should not depend on the whims of governments.'²⁴¹

²³⁷ N. Lerner, *supra* note 227 at 99

²³⁸ N. Lerner, *supra* note 227 at 99

²³⁹ R. McCorquodale, *supra* note 211 at 866

²⁴⁰ R. McCorquodale, *supra* note 211 at 867

²⁴¹ R. McCorquodale, *supra* note 211 at 867

To reject McCorquodale's explanation is to allow Saddam Husain or Idi Amin or any other dictator the freedom to ignore the Universal Declaration Of Human Rights which states that '[e]veryone has a right to life, liberty and security of person'.²⁴²

As has been generally accepted, the element of self-identification by a group as a 'people' is the 'fundamental criterion' of the definition of a people.²⁴³ If the peoples are those who *self-determine* then it would not be necessary for outsiders to decide who the people are. Particularly if the people in question has been denied the right of self-determination, as described by Bhala above, 'the right belongs to who were deprived of it.' It is also necessary for the concerned group to have certain objectively determinable common characteristics, e.g., language , history or religion.²⁴⁴

Special Rapporteur of the United Nations, Aureliu Cristescu describes the characteristic of a people as follows:

1. The term 'people' denotes a social entity possessing a clear identity and its own characteristics.
2. It implies a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population.
3. A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognised in Article 27 of the International Covenant on Civil and Political Rights.²⁴⁵

²⁴² Article 3 of the Universal Declaration of Human Rights

²⁴³ R. McCorquodale, *supra* note 211 at 867; L. Buchheit, *supra* note 105 at 9

²⁴⁴ H. Hannum, *supra* note 114 at 35

²⁴⁵ A. Cristescu UN Special Rapporteur, *The Right to Self-determination; Historical and Current Development on the Bases of the United Nations Instruments* (New York, United Nations Publication, 1981)

The relationship between a people and a well defined territory is especially important for two reasons:

1. Without a specific territory it is difficult to give any practical force to its right of self-determination.
2. A specific territory is one of the main characteristics that will separate a people from an ethnic, religious, or linguistic minority.

There is, however some consensus among commentators that a people must exhibit some or all of the following characteristics:

- a distinctive language, religion or culture;
- a common history;
- a commitment or aspiration to maintain its distinctive aspiration in order to maintain its distinctive identity;
- and an attachment to a well-defined territory.²⁴⁶

It is clear from the above discussion that all the various attempts to define the claimants of the right of self-determination is ambiguous in some way. This should come as no surprise as it is the only way in which colonialism could/can work. If there were obvious or easily identifiable 'selves' and if the rights to which the 'selves' are entitled were identifiable and universally respected then there would be no justification for the domination of one group by another.

Despite the fact that the right of self-determination originated from the cries of oppressed peoples *vis-a-vis* oppressors, and hence reflects the interest of oppressed peoples, most commentators refrain from a definition of the concept of 'people' which refers to a

²⁴⁶ I. Brownlie, *supra* note 127 at 72; R. McCorquodale 'Self-Determination Beyond the Colonial Context and its Potential Impact on Africa' (1992) Volume 4 Part 3 *Journal of The African Society of International and Comparative Law* 592 at 592

specific people within the boundaries of a particular state for fear of infringing the sovereignty of that state. In so doing, they partially, if not wholly, legitimise the rights of the conqueror. This is contrary to the Universal Declaration of Human Rights which states in Article 1 that:

‘All human beings are born free and equal in dignity and rights’.

This affirms that the equality of human beings is a universal right which belongs to each and every human being regardless of whether a particular state (such as former apartheid South Africa) recognises a certain part of its inhabitants as equal or not.

According to Article 1 of both International Covenants on Human Rights

‘All peoples have the right of self-determination’

This affirms the universal character of the right of self-determination. Whether or not Churchill or any other colonial power accepts this fact or not, is irrelevant. As long as a group of human beings is conscious of its distinctive identity from other groups and fulfils the objective criteria postulated by, inter alia, Cristescu, they will qualify to be described as a people.

As discussed above, another definition of the concept of ‘peoples’ is formulated with reference to the inhabitants of ‘a given territory’ with the pre-condition that there should be ‘government by the consent of the governed’. This is yet another example of the hypocritical formulation of a definition of ‘peoples’ which only serves the particular interests of a unique collectivity such as the settler population of the United States of America. The Government of the United States was definitely not established on the free will of the African slaves or the native Americans, but rather on the basis of the will of the foreign settlers. The American nation was created as a ‘territorial entity’ in accordance

with the settler policy of British colonialism to the detriment of the 'indigenous people' and with total disregard for their historical claims.

In stark contrast, the Israeli state was established in Palestine by the British Mandatory government of Palestine and its establishment was justified on the basis of the historical claims of the Jews to Israel. One 'nation' was imported by force whilst the other 'nation' was exported by force.

Many *kingdoms* were established after the First World War in accordance with secret treaties among the colonial powers which defied the principle of 'government by consent of the governed'. The Arab nation was, for example, divided into, inter alia, the Arab Emirates, Kingdom of Iraq, Kuwait, Kingdom of Jordan.²⁴⁷ Considerations of economical benefits and loyalties of the appointed kings to the colonial powers, far outweighed democratic principles. Although the Arabs in these various states speak the same language and have the same religion, history, culture and were unified in their struggle against the Ottoman Empire for the liberation of the Arab nation, they were divided by the colonial powers as a strategical manoeuvre to protect the interests of the colonial powers in this region.²⁴⁸ This policy of fragmentation of the Arab nation has resulted in the Arabs of Iraq and Kuwait being modern day enemies.

For example, the Arabs of Iraq and Kuwait both speak the same language and have the same religion, history, culture. As a part of the Arab nation, the peoples of both Iraq and Kuwait struggled against the Ottoman Empire for their liberation. However, they were divided by the British during the First World War. The contradiction lies in the fact that, today, the people of Iraq and Kuwait are two enemy 'nations' or 'peoples' - pawns used to protect the interests of the colonial powers in the region.

²⁴⁷ *The Question of Palestine* (New York: United Nations, 1979) [Prepared for, and under the guidance of, the Committee on the Exercise of the Inalienable Rights of the Palestinian People] at 4

²⁴⁸ A. Whelan, *supra* note 138 at 100

A definition that justifies the colonial entities as the only 'self' or 'people' who can claim the right of self-determination is as false as the definition of 'people' according to territorial entity. It is illogical to speak about the right of *self*-determination where the *self* was never a part of any decision. The behaviour of the colonial powers presented another contradiction. On the one hand they supported the notion of *equality of nations*. On the other hand, they not only colonised peoples into various categories of mandates according to their degree of civilisation, but they also tried to exclude the application of the right of self-determination from their colonies.

5.2 WHAT CAN BE DETERMINED BY THE SELF?

Having examined who it is that may be defined as the self or the peoples to whom the right of self-determination applies, it is now apposite to enquire what exactly it is that may be determined by the self. Would you have asked this question to an emperor before the first World War, he would have answered that only he was entitled to determine the fate of his subjects. The people within the borders of his empire were not entitled to determine anything which potentially threatened the sovereignty of the empire and its territorial integrity. Neither the Ottoman Empire, Austro-Hungarian Empire, Russian Empire nor the British Empire would accept the right of the Greeks, Poles, Irish, Egyptians, Armenians, Indians, Czechoslovakians, Yugoslavians, Bulgarians, Finnish, Pakistanis, Panamese, Iraqis, Syrians, Kuwaitis or the Saudi Arabians to self-determination.

Would you have asked this question to any of the colonialist powers after the first World War, it would have elicited a similar response with similar emphasis and insistence on non-intervention in their domestic affairs.

Mr Nelson Mandela would spend 27 years in prison for having asked this question to the then government of South Africa after the implementation of its apartheid and racist

regime - as a black he was perceived as not being civilised enough to determine anything. The notion of the equality of blacks to the European white settlers was in conflict with the racist policy of the then government and its statist approach to democracy.

So too the Palestinians were to become 'Arab refugees' in Lebanon, Jordan and elsewhere once they attempted to claim the right of self-determination *vis-a-vis* the mandatory government and Jewish settlers.

Kurds who ask this question are branded as terrorists, separatists and bandits and the ruling powers employ any possible means to eradicate this separatism. The British Royal Air Force, and the governments of Turkey, Iran and Iraq actively participated in the bombing of Kurdish villages and towns as punishment. Survivors would be taken to so-called 'safe havens' or refugee camps in their *own* country - the very country inhabited by them for thousands of years. Other forms of punishment meted out by the ruling powers include the gassing and burning of entire Kurdish villages and towns, and the raping, torturing and killing of innocent civilians.

Posing this question to the people living within the empires or colonies, would have elicited quite a different response: outcries such as 'liberation from the prison of the nations' or 'liberation from the exploitation and colonial expansionism', or 'freedom from racist governments' would not be uncommon. The right of self-determination belongs to peoples and not to governments or emperors. It is the people who must be able to exercise the content of the right - governments should not be allowed to demarcate the limits of the right for the people. In the quest for independence from colonial rule within the African context the observation has even been made that '...an authoritarian ruler from among "us", even a dictator like Idi Amin, may provide a greater sense of freedom than a democratic foreign ruler'²⁴⁹

²⁴⁹ B. Neuberger, *supra* note 1 at 14

Today there are not many colonies left and no country refers to itself as an empire or a colonialist power. States exist in various forms. References to imperial and colonial power have been replaced by terms such as 'territorial integrity of States' and 'State sovereignty'. Today Mr Mandela is the president of the country where he spent 27 years in jail pursuant to his demands for the right of self-determination for his people. Palestinians have established their State and they are no longer 'Arab Refugees'. They are now citizens of the State of Palestine.

But these peoples' right to self-determination was not handed to them on golden plates. In the words of Judge Ammount in the Namibia case:

'One is bound to recognise that the right of peoples to self-determination, before being written into charters that were not granted but won in bitter struggle, had first been written painfully, with the blood of the peoples, in the finally awakened conscience of humanity'.²⁵⁰

5.3 DECOLONISATION ERA

At least since the French revolution practical effect was given to self-determination by means of plebiscites for the purpose of achieving the unification of nations or the secession of nations from imperial and colonialist powers.²⁵¹ During the decolonisation era, particularly from 1945 until the 1970s, the right of self-determination was almost synonymous with the liberation of colonies from the colonial powers.²⁵² Support for self-determination within colonial boundaries has been widespread both in the United Nations and the Organisation of African Unity as well as among the socialist states.²⁵³

²⁵⁰ R. McCorquodale, *supra* note 246 at 592

²⁵¹ A. Whelan, *supra* note 138 at 100

²⁵² R. McCorquodale, *supra* note 246 at 593

²⁵³ B. Neuberger, *supra* note 1 at 26

Marx supported the right of the Polish people to secede and to establish their independence from the different occupying neighbouring empires. Lenin and Stalin both actively supported the right of self-determination as it implied 'a consistent expression of the struggle against all national oppression'.²⁵⁴ Lenin strongly supported the right of secession. He propounded self-determination in an essentially anti-colonialist form with the purpose of disrupting colonial empires and redistributing power in the international community on the basis of the notion of equality among nations.²⁵⁵ For him, the self-determination of nations meant '...the political separation of these nations from alien national bodies, and the formation of an independent national state'.²⁵⁶

The USSR advocated the application of the right of self-determination of peoples both to national groups in Europe and to peoples under colonial domination.²⁵⁷ Article 72 of the USSR Constitution 1977 provided that 'the right of free secession from the USSR shall be preserved for each union republic'.²⁵⁸ However, during the decolonisation era, the USSR failed to come out in support of self-determination in a secessionist context. It only supported the right of self-determination in as far as it meant the liberation of colonies from the colonial yoke. This was *inter alia* done under pressure of the multinational ex-colonies who had already achieved independence but who feared that their own ethnic groups would demand the right of self-determination in a secessionist context.

The manner in which the colonial powers drew the borders of their various colonies divided many peoples amongst neighbouring countries.²⁵⁹ The borders demarcated by the colonial powers caused different ethnic and religious groups to be included in the same colony, which was fertile breeding ground for conflict. The division of peoples amongst neighbouring countries also caused permanent tension across the borders of neighbouring countries. Once the colonies became independent, the colonial powers insisted that they

²⁵⁴ R. McCorquodale, *supra* note 246 at 596

²⁵⁵ A. Cassese, *supra* note 131 at 135

²⁵⁶ V.I. Lenin, *supra* note 117 at 47

²⁵⁷ A. Cassese, *supra* note 131 at 58

²⁵⁸ R. McCorquodale, *supra* note 246 at 596

²⁵⁹ B. Neuberger, *supra* note 1 at 9

do so within the artificial colonial boundaries to ensure the continuance of the existing tension. The division of the Kurdish people amongst Turkey, Iran, Iraq, Syria and the former USSR, as well as the colonies in Africa and Asia are clear examples of this strategy. This was no coincidence as it was obviously in the interest of the 'divide and rule' strategy of the colonialist powers.

The colonial powers used the fear of aggressive Nazi nationalism and Mussolini's fascism, which were still fresh in everybody's memory, for the protection of the colonial boundaries.²⁶⁰ The settler countries on the American continent also used this fear as justification for the non-recognition of minority rights in their attempts to assimilate various minority groups.²⁶¹ Because of this fear the United Nations Charter did not afford any protection for minorities. In 1947 the United Nations Secretariat took the view that the League of Nations minority system had ceased to exist in favour of a new universal and individualistic conception of human rights.²⁶² Although the Universal Declaration of Human rights contains general clauses prohibiting discrimination, it does not make mention of the protection of minorities²⁶³ or the right of self-determination.²⁶⁴ During the debate preceding the adoption of the Declaration, proposals in this respect were presented by Yugoslavia, the USSR and Denmark. These proposals were rejected for fear of creating incentives for separate tendencies and movements.

The effect of European racism must also not be underestimated. Until after the second World War they regarded the principle of self-determination as irrelevant within the context of the African and Asian colonies and only applicable to the European nations. While plebiscites were taking place in Europe after the first World War as a means of practical implementation of the right of self-determination according to ethno-cultural

²⁶⁰ B. Neuberger, *supra* note 1 at 12-13

²⁶¹ J. Symonides *The Exercise of Collective Human Rights* [Paper delivered on Collective Rights of Minorities in Europe at a Conference on the Changing Political Structure of Europe: Aspects of International Law (Amsterdam, Netherlands, 14-15 December 1990)] at 6

²⁶² J. Symonides, *supra* note 261 at 6

²⁶³ J. Symonides, *supra* note 261 at 6

²⁶⁴ H.A. Wilson, *supra* note 112 at 62

criteria,²⁶⁵ the 'tribes'²⁶⁶ of the colonies did not have any such rights whatsoever. They were to be trained by the civilised Mandatory governments. This was legalised by the League of Nations mandatory system and was eventually succeeded by the Trusteeship system under Chapters XII and XIII of the United Nations Charter.²⁶⁷ According to Aureliu Cristescu,

'...the mandates system was devised as a compromise solution between the ideal of self-determination and the interests of the occupying powers.'²⁶⁸

The colonial powers referred to the inhabitants of colonies as 'tribes' or 'natives'. On the one hand this was motivated by racism and on the other, they avoided labelling them as 'peoples' for fear that they would then be regarded as entitled to the right of self-determination.²⁶⁹

Although it is now generally accepted by the international community that the liberation of the trust and mandate territories which were established under Article 22 of the League of Nations Covenant and Chapters XII and XIII of the United Nations Charter was an exercise of the right of self-determination, the colonial powers at the time denied the application of the right of self-determination to their colonies.²⁷⁰

In response to the reaction of the British Empire to the incorporation of the principle of self-determination in the Atlantic Charter, Churchill told the British Parliament in September 1941 that paragraph no 3 of the Atlantic Charter did not apply to India or Burma or other parts of the British empire but only to European nations occupied by the Nazis.²⁷¹

²⁶⁵ *Supra* paragraph 3.5 at 53

²⁶⁶ B. Neuberger, *supra* note 1 at 33

²⁶⁷ A. Whelan, *supra* note 138 at 107

²⁶⁸ A. Cristescu, *supra* note 128 at 471

²⁶⁹ B. Neuberger, *supra* note 1 at 10

²⁷⁰ A. Cristescu, *supra* note 128 at 474

²⁷¹ A. Eide, *supra* note 106 at 28; see also *supra* paragraph 3.6 at 56

Another clear example of the colonialists' resistance against the struggle of their colonies for the right of self-determination was the situation in French North Africa. Morocco, which had been a protectorate of France since 1912, set the process of demanding rights of self-determination in motion during 1950. The Arab League supported the Moroccans' claims and described French administration in Morocco as 'incompatible with the principle of self-determination of nations and the rights of man'.²⁷² The French government and a number of Western countries regarded the Arab League's proposal as an interference in French domestic affairs.²⁷³ In its Eighth Session the First Committee of the United Nations adopted a draft resolution which recognised

'the right of the people of Morocco to complete self-determination in conformity with the Charter [of the United Nations] and renewed its appeal for the reduction of tension in Morocco and [urged] that the right of the people of Morocco to free democratic political institutions be ensured'.²⁷⁴

The Resolution failed as it did not muster the necessary two thirds support. The French delegation was absent in protest.

Tunisia, which was also a French protectorate, faced similar obstacles in its quest for self-determination. A draft resolution which referred to the right of self-determination for Tunisia was also presented by the First Committee at the Eighth session of the Assembly of the United Nations, but also failed to garner the necessary two-thirds majority.

Even though both resolutions failed at the Assembly (where a two-thirds majority is necessary) the draft resolutions still remain significant as they received majority support in the first committee. Eventually, and after much blood shed, Morocco and Tunisia were admitted to the United Nations at its eleventh session in 1956. The increasing number of

²⁷² H.A. Wilson, *supra* note 112 at 63

²⁷³ H.A. Wilson, *supra* note 112 at 63

²⁷⁴ H.A. Wilson, *supra* note 112 at 64

new states in the UN would make it increasingly difficult for the Western powers to defeat such resolutions in later years.²⁷⁵

The struggle of the Algerians against French colonialism spanned the period from 1954 to 1962. From 1955, when the question first came before the Assembly, until 1960, resolutions in support of Algeria's right to self-determination was met with fierce resistance from France as well as a number of other Western powers and were consistently defeated.²⁷⁶ The Algerians' right to self-determination was only recognised by the Assembly in Resolution 1573 (XV) of 1960.

Demands for the right of self-determination did not stop with the demise of colonialism. In fact, it increased. The USSR, which supported the liberation of colonies within colonial boundaries, collapsed mainly as a consequence of the demand of the right of self-determination by its component republics.²⁷⁷ The two Germanys united on the basis of self-determination. Claims for self-determination gave rise to the independence of Bangladesh and caused the Czechs and the Slovaks to split up into two independent republics. All these peoples successfully asserted their rights to self-determination but none of them were classified as official colonies by the League of Nations or in terms of the United Nations Trust Territories system.

Today European nations such as the Germans or Italians are proud of their nationality and have their own independent national States. The borders of the respective countries in Europe do not give rise to much concern and are no longer fervently protected by land mines, electrical or barbed-wire fences. But there are genocide and 'ethnic cleansing' in many former colonies who are today still suffering the consequences of the artificial borders created by the colonialist powers.

²⁷⁵ H.A. Wilson, *supra* note 112 at 65

²⁷⁶ H.A. Wilson, *supra* note 112 at 66

²⁷⁷ R. McCorquodale, *supra* note 246 at 593

The ethnic problems or ethnic 'cleansing' or 'genocide' taking place in Rwanda, Zaire, Somalia, former Yugoslavia, Czechoslovakia, Kurdistan, and the fighting between the Kurds and Arabs in Iraq and Syria, between the Kurds and Turks in Turkey, and between the Kurds and Persians in Iran are the direct result of the artificially created borders which divided peoples among the respective neighbouring countries. These peoples were all the unfortunate victims of the divide and rule strategy of the colonialist powers. Neither the prevention of nationalism nor the design and protection of the boundaries of the respective countries operated in favour of these peoples.

5.4 SECESSION

Most of the United Nations and other international instruments recognise that all peoples have the right of self-determination by virtue of which they can freely determine their political status. The question now arises whether the right of self-determination may be claimed *vis-a-vis* a sovereign state or not, in other words, whether the right of self-determination includes the right of secession.

Who is correct: Abraham Lincoln when he said in 1861, almost a century after America was declared independent from Britain, 'Plainly, the central idea of secession is the essence of anarchy'²⁷⁸ or Alfred Cobban, when he said in 1944, 'The history of national self-determination is a history of the making of nations and the breaking of states.'²⁷⁹

This question immediately brings many other questions to mind: if the right of self-determination does not include the right of secession, how did the United States of America become a state? How did the member states of the United Nations triple to more than 160 states from 1945 to 1996? How did the colonies achieve independence? How

²⁷⁸ B. Neuberger, *supra* note 1 at 69

²⁷⁹ B. Neuberger, *supra* note 1 at 69

were the former colonies transformed into states? Why the insistence on the principle of *uti possidetis*²⁸⁰ (being the maintenance of colonial boundaries)?

During the first World War, the United States of America and their allies supported the right of self-determination of many nations in a secessionist context against the Ottoman empire, Austro-Hungarian Empire and the Russian empire. President Woodrow Wilson supported the right of small nations to secede and the notion that ethnically identifiable peoples or nations would govern themselves.²⁸¹ Many of these nations which the United States of America supported in this context were under the domination of the abovementioned empires since before the discovery of America. However, following their wartime victory, the United States of America and the allied powers changed their minds in support of territorial integrity and the boundaries of the existing states became paramount until the second World War.

In 1950 there were only three independent countries in Africa: Egypt, Ethiopia and Liberia. Today there are more than 40 independent countries on the African Continent.²⁸² How were these new independent countries brought into existence? Did they not also at one time form part of the territory of another country?

History repeated itself during the second World War: the same actors once again came out in support of the right of self-determination in a secessionist context and even included this notion in the Atlantic Charter. However, following their victory, they once again hailed territorial integrity as supreme. This is ironic: the allied powers had consistently supported the right to self-determination of those colonies which were dominated by the abovementioned empires. However, with the demise of the empires, the allied powers colonised these territories which were dominated by the former empires and then proceeded to deny these peoples the right of self-determination. After all the former colonies had achieved independence, those powers who had consistently denied the

²⁸⁰ R. McCorquodale, *supra* note 246 at 607

²⁸¹ A. Whelan, *supra* note 138 at 100

²⁸² R. McCorquodale, *supra* note 246 at 596

existence of the right of self-determination since the establishment of the United Nations in the 1970s, finally acknowledged that the right to self-determination did in fact exist, but could only be asserted by the colonies.

France, for example, supported the right of self-determination of those peoples who were dominated by the empires. With the demise of the empires, France started colonising these peoples aggressively with complete disregard for their calls for self-determination. It was only after much bloodshed and a struggle that spanned the first and second World Wars and beyond, that the colonies finally managed to establish their independence.

Although the colonial powers may have denied it at the time, it is now accepted by the international community that decolonisation was an exercise of the right of self-determination. The United Kingdom's acceptance hereof is clear from the statement by its representative in the Security Council on 25 May, 1982 (in the context of the Falkland/Malvinas dispute):

"It is true that we took the position in the 1960s that self-determination was a principle and not a right ... Not only has my country [now] endorsed the right to self-determination in the sense of the Charter, the [International Human Rights] Covenants and the Friendly Relations Declaration [1970], but we have gone a great deal further to disprove the allegation that we are a colonial power *par excellence*. Since General Assembly Resolution 1514 (XV) was adopted at the end of 1960, we have brought to sovereign independence and membership of this organisation no less than 28 States".²⁸³

Although Article 1(2) of the United Nations Charter describes the concept of self-determination as a principle and not a right, it was subsequently formulated to give recognition to self-determination as a *right* in the International Covenants on Human Rights and other United Nations instruments. In modern day international law there is

²⁸³ R. McCorquodale, *supra* note 246 at 596

general acceptance of the fact that self-determination of peoples is not only a political principle, but a right and furthermore that it is a rule of customary international law. Many United Nations representatives agree that the right of self-determination of peoples is a peremptory norm of international law, capable of overriding all other international legal norms and even such other peremptory norms as the prohibition of the threat or use of force in international relations.²⁸⁴

Since the acceptance of the right of self-determination as a part of modern international law by both the United Nations and the majority of authors, other dimensions of the right of self-determination have also been recognised in various international instruments, such as *inter alia*:

- (a) United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources²⁸⁵ which deals with 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources' and describes it as 'a basic constituent of the right to self-determination.'²⁸⁶
- (b) The Declaration of the Principles of International Cultural Co-operation by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1966 which proclaims the right of each people to develop its culture and to engage in cultural co-operation with due regard for human rights and fundamental freedoms. This stood in stark contradiction to the assimilationist policy of the League of Nations and the United Nations. The pertinent part of Article 1 of the Declaration reads as follows:²⁸⁷
 - (1) Each Culture has a dignity and value which must be respected and preserved.

²⁸⁴ M. Pomerance, *supra* note 216 at 1; R. McCorquodale, *supra* note 246 at 594

²⁸⁵ Resolution 1803 (XVII)

²⁸⁶ J. Crawford, *supra* note 115 at 181

²⁸⁷ J. Crawford, *supra* note 115 at 183

- (2) Every people has the right and the duty to develop in culture.
- (c) The Universal Declaration of the Rights of Peoples, Algiers, 4 July 1976 which contains similar contradictions against the assimilationist policy of the United Nations. The pertinent articles read as follows:²⁸⁸

Article 13

'Every people has the right to its own language and to preserve and develop its own culture, thereby contributing to the enrichment of the culture of mankind'

Article 14

'Every people has the right to its artistic, historical and cultural wealth.'

Article 15

'Every people has the right not to have an alien culture imposed upon it.'

- (d) The International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1974 which declared apartheid a crime against humanity and defined it as a violation of human rights,

'committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them.'²⁸⁹

²⁸⁸ J. Crawford, *supra* note 115 at 187

Another principle of international law which goes hand in hand with the right of self-determination is the principle of equal rights of people and non-discrimination.²⁹⁰ The Declaration on Friendly Relations²⁹¹ as well as the Charter of Economic Rights and Duties of States (Resolution 3281 (XXIX) of 12 December 1974) refer to '...equal rights and self-determination of peoples...' whilst the Helsinki Declaration of 1975 repeatedly refers to '...the equal rights of peoples and their right to self-determination'.

Chapter 1 of part 1 of the African Charter of Human and Peoples' Rights, which deals with 'Rights and Duties' deals with the principle of equal rights of peoples and the right of self-determination in the following terms:²⁹²

Article 19

'All people shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.'

Article 20

- (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. ...

Article 1(2) of the Charter of the United Nations refers to '*respect* for the principle of the right of self-determination'. The Declaration on Friendly Relations also places a *duty* on member states of the United Nations to respect the right of self-determination in accordance with the provisions of the UN Charter.²⁹³ The International Covenants on Human Rights which are legally binding on the State parties who ratified the Covenants

²⁸⁹ J. Crawford, *supra* note 115 at 186

²⁹⁰ I. Brownlie, *supra* note 127 at 553

²⁹¹ Principle 5, paragraph 1

²⁹² J. Crawford, *supra* note 115 at 198

²⁹³ Principle 5 ('The Principle of Equal Rights and Self-Determination of Peoples'), paragraph 1

imposed a similar obligation on those State parties to *respect* this right and its application in general. However, article 3 of both the Covenants goes a step further by stating that the states which are parties to the Covenants, including those states who are responsible for the administration of non-self-governing and trust territories, should '*promote the realisation of the right of self-determination*'.

The Helsinki Declaration also imposes an obligation upon states to respect the equal rights of peoples and reaffirms 'the universal significance of respect for and effective exercise of equal rights and self-determination of peoples'.²⁹⁴

The Algiers Universal Declaration of the Rights of Peoples made a clear separation between the rights of people as opposed to the rights of governments and of states and makes it clear that the denial of the right of self determination of a people by a particular State constitutes a violation of the right of that people as well as a breach of obligations towards the international community as a whole.²⁹⁵

Since the French Revolution it has been accepted as an integral part of self-determination and as a basic rule of democracy that governments should be based on the free will of the people and that self-determination belongs to peoples and not to governments. As Judge Dillard stated in the Western Sahara Case:

'It is for the people to determine the destiny of the territory and not territory the destiny of the people.'²⁹⁶

However, governments are not always representative of the peoples in a particular state. Neither the former South African nor the Rhodesian racist governments were accepted as representative of the peoples in their respective states by the international community. The former colonial governments were also not representative of the peoples in the

²⁹⁴ A. Cassesse, *supra* note 135 at 149

²⁹⁵ Article 22

²⁹⁶ R. McCorquodale, *supra* note 246 at 593

respective colonies. Where a government has been democratically elected by a majority in a particular state, it may very well be a tyranny for the minority groups in the particular state despite the democratic process, particularly where the minority groups have not been recognised or protected by the constitution of that state.

According to the Declaration on Friendly Relations, minority groups and other peoples living in an independent and sovereign state may assert their right of self-determination when the government of the particular state does not represent the whole people belonging to the territory without distinction as to race, creed or colour.²⁹⁷ In these circumstances, they are even entitled to secede.²⁹⁸ In terms of paragraph 4 of principle 5 of the Declaration, which deals with equal rights and self-determination of peoples,

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

The right of secession has commonly been accepted as an essential part of the right of self-determination and is not necessarily in conflict with the principle of territorial integrity. According to Weller the concept of 'territorial integrity of states' should be understood as:

'protect[ing] States against outside aggression and annexation not precluding reorganisation from within or home grown attempts at secession'.²⁹⁹

The Declaration on Friendly Relations contains similar sentiments in that it imposes a duty on states to 'refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country'.³⁰⁰

²⁹⁷ Principle 5 ('The Principle of Equal rights and Self-determination of Peoples'), Paragraph 7

²⁹⁸ A. Cassese, *supra* note 135 at 144

²⁹⁹ M. Weller, *supra* note 141 at 19

³⁰⁰ Principle 5 ('The Principle of Equal rights and Self-determination of Peoples'), paragraph 8

The League of Nations considered the principle of self-determination to apply in situations where a State brutally violates or lacks the will or the power to protect human dignity and the most basic human rights.³⁰¹ According to Cristescu³⁰², the assertion of this principle is an absolutely exceptional solution and only seems to be justified if a people conscious of its own identity and settling on a common territory is discriminated against as such and if no effective remedies exist in municipal and international law to adjust the situation.

Various other instruments which deal with self-determination give recognition to the secessionist dimension of self-determination. Examples hereof are:

- (a) The Universal Declaration of Rights of Peoples, which provides that:

Article 3

'Every people has the right to retain peaceful possession of its territory and return to it if it is expelled.'

Article 6

'Every people has the right to break free from any *colonial or foreign domination*, whether direct or indirect, and from any racist regime.'³⁰³

(emphasis added)

Article 6 recognises that it is not only colonies which are entitled to assert the right of self-determination. This right is also available to peoples under foreign domination.

³⁰¹ League of Nations Council Doc. B7/21/68/106 VII, at 22-23

³⁰² A. Cristescu, *supra* note 128 at 473

³⁰³ J. Crawford, *supra* note 115 at 187

- (b) Paragraph 2 of Article 20 of the African Charter on Human and Peoples' Rights which provides that:

*'colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.'*³⁰⁴ (emphasised added)

- (c) The Helsinki Declaration³⁰⁵ states;

'...all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference and to pursue as they wish their political, economic, social and cultural development'

The phrase *'...when and as they wish...'* gives recognition to the fact that self-determination has been accepted as a universal and continuing right in modern international law. It may be asserted over and over again by peoples as their circumstances change. The fact that a people has asserted its right of self-determination once, does not make it irreversible for all times.

It is also important to reiterate that the right of self-determination is a right which belongs to the people themselves. It is a right which must be exercised by the 'self' and cannot be imposed on peoples by outsiders or foreigners. Insistence on the principle of 'sovereignty of State' or 'territorial integrity of States' seems quite ironic as many of those states who insist on this principle once formed part of the territorial integrity of other states or empires. These new territorial integrates were mostly determined by external victorious powers on the conference tables by way of ruler and red pencil, and not by the claimants of the right themselves.

³⁰⁴ J. Crawford, *supra* note 115 at 198

³⁰⁵ A. Cassese, *supra* note 135 at 149

Although the disintegration of these newly formed states violated the territorial integrity of those states or empires to which they belonged, they now view the violation of their own territorial integrity as completely taboo.

- (d) Paragraph 1 of the Declaration on Granting of Independence to Colonial Countries and Peoples states that:

'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights.'³⁰⁶

Once again it is made clear that the application of the right of self-determination is not only limited to colonial countries but to all peoples under alien domination.

Recent developments are indicative of the fact that secession is not only limited to those situations where the government of a particular state does not represent the whole people belonging to the territory without distinction as to race, creed or colour, as was envisaged in paragraph 7 of the Declaration on Friendly Relations. During March 1992, 14 of the 15 former Republics of the USSR were recognised as independent member States of the United Nations.³⁰⁷ The 1990s also saw the division of Czechoslovakia into the two independent Republics of Czech and Slovakia. Yugoslavia has now also disintegrated into separate republics. All these various republics successfully claimed the right of self-determination. It is significant that in none of these instances were there any claims that one people was dominating another or that the respective former governments were not representative of the peoples belonging to the particular territory regardless of their race, creed or colour. In fact, all these peoples shared power in their respective federal governments.

³⁰⁶ R. McCorquodale, *supra* note 246 at 602

³⁰⁷ R. McCorquodale, *supra* note 246 at 598

Having examined the content and the various dimensions of the right of self-determination it appears that there is general acceptance that the right of self-determination is:

‘[t]he right of cohesive national groups (‘peoples’) to choose for themselves a form of political organisation and their relation to other groups. The choice may be independence as state, association with other groups in a federal state or autonomy or assimilation in a unitary (non-federal) state’.³⁰⁸

Claims to self-determination can be divided into two basic categories. The first category is termed ‘external self-determination’, i.e. ‘the act by which a people determines its future international status and liberates itself from “alien” rule.’³⁰⁹

External self-determination may also mean the right of a nominally independent state to true independence and the international recognition of the independence of a people as was the case with India in 1937 and Hungary in 1956.³¹⁰

The second category is termed ‘internal self-determination’ and it relates to the right of the people to choose a desired form of government, whether it be democratic, socialist or any other regime³¹¹ and the right of an ethnic, racial, religious or other minority within a sovereign state effectively to be represented in the government or to be able to organise as a separate political or social unit in an attempt to be protected from oppression by the central government.³¹²

³⁰⁸ I. Brownlie, *supra* note 127 at 595-598

³⁰⁹ M Pomerance, *supra* note 216 at 37

³¹⁰ J.E.S. Fawcett *The Law of Nations* (Middlesex: Penguin Books Ltd, 1971, 2nd ed) at 44

³¹¹ M Pomerance, *supra* note 216 at 37

³¹² J. E. S. Fawcett, *supra* note 310 at 44

5.5 THE CLAIMANTS OF THE RIGHT OF SELF-DETERMINATION AND KURDS

Before examining the application of the right of self-determination to the Kurdish people it would be instructive to provide a short overview of the historical development of the Palestinian peoples' struggle for the right of self-determination as it is a struggle with many analogies to the Kurdish struggle. This will not only shed light on the political influences of the Kurdish and Palestinian peoples in the Middle East, but will also highlight the discrimination in the application of international law to different peoples.

5.5.1 PALESTINE

Despite their uncertain existence and the extension of their territorial sovereignty and their very long struggle for their right of self-determination, the Palestinians achieved statehood after a very long struggle for their right of self-determination.³¹³

Cananaeans were one of the earliest known Semitic races which inhabited Palestine, albeit as dependants of the Egyptians. Both the Arabs and the Jews claim Abraham as their common ancestor. In the Cananaean era, Abraham made his way from Ur in Chaldea to Canaan and this became the cradle of the people of Israel. With the end of their captivity in Egypt, the tribes of Israel were united into one kingdom by King David in approximately 1000 B.C. In 720 B.C. the Assyrians destroyed the Kingdom of Israel and carried the inhabitants away as captives. When the Persians conquered Babylon in approximately 520 - 515 B.C., the Jews returned to Palestine. In the year 332 B.C. the Jews came under the domination of the Macedonians. With some intervening periods of independence the Jews eventually came under the domination of the Romans. After Emperor Hadrian (117-138 AD) made Jerusalem a Roman Colony, he prohibited Jews

³¹³ A. Cristescu, *supra* note 128 at 473

from entering Jerusalem. The dispersion of the Jews throughout the world dates from this period and since then, there has been no Jewish nation in possession of Palestine.

After the partition of the Roman Empire in 400 AD, Palestine came under Byzantium rule. In 637 AD, the Arabs conquered Palestine and thereafter Jerusalem became the capital of the Arab realm of Palestine. Arab domination of this territory was interrupted by the Crusaders in 1099. During the 12th century Palestine was re-conquered by the Muslims and Saladin, the great ruler, invited the Jews to return to Palestine in 1190.³¹⁴ Palestine was once again conquered in 1517 - this time by the Turks, who remained in power until December 1917. Palestine then became a mandate of Great Britain simultaneously with Transjordan. Of the 620 000 people living in Palestine in 1918, only 10% were Jewish. In March 1946 Transjordan seceded from Great Britain and became the independent Kingdom of Jordan. The French mandates of Syria and Lebanon, formerly territories of the Ottoman empire, also became independent in 1944 and 1943 respectively. Jewish people emigrated to Palestine in their masses, lured by the Jewish Zionist Organisation's slogan that Palestine was 'a land without people for a people without land'. This despite the fact that Palestine was under the mandatory government's control. The mandatory government's depopulation of Palestine in favour of Jews continued.

Winston Churchill continued with this policy during the second World War. After the war, the United States of America assumed the protective role over the Jews with a policy similar to that of the British. Jewish 'special night squads' which were trained by the British started attacking the Palestinians and simultaneously, the British mandatory government started exiling the Arab leadership of Palestine. This started a new era in Palestinian history, namely the Palestinian Arab Refugee issue. After 30 years of mandatory government, Great Britain finally handed this 'A class mandate' with its refugee problems to the United Nations on 18 February 1947.³¹⁵ On the last day of the

³¹⁴ Cf Chapter 1

³¹⁵ *The Question of Palestine*, supra note 247 at 3-20

withdrawal of British forces from their territory, Israel proclaimed itself an independent state in May 1948³¹⁶ and was admitted to the United Nations in May 1949. The Palestinian issue was viewed as a 'refugee problem' by the United Nations. On 10 December 1969 the General Assembly in Resolution 2535 B (XXIV) noted that

'the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights'.³¹⁷

These views were repeated until 22 November 1974 when the General Assembly in resolution 3236 (XXIX) recognised that 'Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations' and expressed grave concern that 'the Palestinian people has been prevented from enjoying its inalienable rights, in particular its right to self-determination'.³¹⁸

The General Assembly also reaffirmed 'the inalienable rights of the Palestinian people in Palestine' including

1. The right to self-determination without external interference;
2. The right to national independence and sovereignty;³¹⁹

On 10 November 1975 in resolution 3376 (XXX) the General Assembly expressed its concern that no progress had been made towards the exercise of the right of self-determination by the Palestinian people. To this end, the General Assembly decided to establish a Committee on the Exercise of the Inalienable Rights of the Palestinian People. The Committee drafted a series of recommendations but the Security Council was not able

³¹⁶ *The Question of Palestine, supra* note 247 at 21

³¹⁷ 'Right of Peoples and Nations to Self-Determination', *supra* note 168 at 60

³¹⁸ 'Right of Peoples and Nations to Self-Determination', *supra* note 168 at 60

³¹⁹ 'Right of Peoples and Nations to Self-Determination', *supra* note 168 at 60

to act on or implement these recommendations. In Resolution 36/120C of 10 December 1981, the General Assembly decided to convene an International Conference on the Question of Palestine under the auspices of the United Nations. This Conference was held at Geneva from 29 August to 7 September 1983 and it adopted the Geneva Declaration on Palestine which set out guidelines consistent with the principles of international law which could serve as a basis for an international effort to resolve the Palestinian question. It stated in part that:

1. The conference...expresses the grave concern of all nations and peoples regarding the international tension that has persisted for several decades in the Middle East, the principal cause of which is the denial by Israel, and those supporting its expansionist policies, of the inalienable rights of the Palestinian people. The conference reaffirms and stresses that a just solution of the question of Palestine, the core of the problem, is the crucial element in a comprehensive, just and lasting political settlement in the Middle East.'
2. The Conference recognizes that, as one of the most acute and complex problems of our time, the question of Palestine - inherited by the United Nations at the time of establishment - requires a comprehensive, just and lasting political settlement. This settlement must be based on the implementation of the relevant United Nations resolutions concerning the question of Palestine and the attainment of the legitimate, inalienable rights of the Palestinian people, including the right to self-determination and the right to the establishment of its own independent State in Palestine and should also be based on the provision by the Security Council of guarantees for peace and security among all States in the region, including the independent Palestinian State...³²⁰

³²⁰

'Right of Peoples and Nations to Self-Determination', *supra* note 168 at 61

5.5.2 KURDS

The claim of the right of self-determination by the Kurdish People must be examined and evaluated against the background of objective principles of international law. The viewpoint of the different states and their respective political objectives should not come into play when one has to determine whether such a right exists or not. The recognition or non-recognition of a 'people' is a political policy instrument and not a legal act. Whilst the recognition of a 'people' may greatly assist the exercise of the right of self-determination, such recognition cannot be seen as a prerequisite to either the existence of a 'people' or of their right of self-determination.³²¹

It might be instructive to provide a brief overview of the demise of the Yugoslavian federation to demonstrate how the political agendas or economical interests of existing states influence their recognition or non-recognition of various peoples' right of self-determination.

After the first World War, the victorious powers, and not the peoples of the region, created the federal state of Yugoslavia, which consisted of six republics (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia) and two autonomous regions (Kosovo and Vojvodina).³²² Its mixture of peoples, religions and cultures have always provided a source of conflict, in particular between the Serbs and the Croats. Although both the Serbs and the Croats are Slavic peoples, the Croats were for centuries under German-Austrian domination and are Catholic; the Serbs were part of the Turkish Empire and are Greek Orthodox or Muslim. The Serbs are the largest national group within Yugoslavia. After the second World War, President Marshal Tito, a Croat, gave Yugoslavia a new constitution. To reduce the power of the Serbs in the state, the

³²¹ R. McCorquodale, *supra* note 246 at 595

³²² R. McCorquodale, *supra* note 246 at 599

boundaries of Yugoslavia's internal republics were redrawn so as to put large numbers of Serbs inside Croatia and Bosnia as a result whereof they became national minorities.³²³

As a result of increasing conflict over growing Serbian influence within the federal state during 1990, the electorate of the Slovenian and Croatian governments approved of their independence in referenda and this independence took effect in June 1991. Their independence was, however, forcibly resisted by the Yugoslavian military and by Serbia.

Initially, the United States of America and the states of the European Community were opposed to the division of Yugoslavian territorial unity. However, in January 1992 the states of the European Community altered their stance and decided to recognise the independence of Slovenia and Croatia. Germany was particularly in favour of Slovenia and Croatia - the richer republics within the Yugoslavian federation - becoming independent as they hoped these states would become economically integrated with Germany. The Serbian minority within Croatia rebelled against this and demanded reunification with Serbia. But Germany was only in favour of the independence of Slovenia and Croatia in as far as it would be within their present boundaries. The reason for this was twofold: firstly, to ensure that Croatia with its riches has a compact territory and secondly, to allay fear on the part of France, Spain and Britain in the EC that a redrawing of the boundaries of Yugoslavia's constituent republics will set a dangerous precedent across Europe.³²⁴ Although the Germans supported the right of self-determination of certain states on the one hand, their political and economical objectives resulted in the denial of the right to self-determination for the Serbs within Croatia.

The Electorate of Macedonia and Bosnia-Herzegovina came out in overwhelming support of independence in referenda held during 1991 and 1992 respectively. The EC has,

³²³ World Comment by Politicus 'Greater Germany vs Greater Serbia' in *Irish Democrat* September 1991 3 at 4

³²⁴ World Comment by Politicus, *supra* note 323 at 3

however, only recognised the independence of Bosnia-Herzegovina due to fierce objections on the part of Greece against the recognition of Macedonian independence.³²⁵

The First Report of the Foreign Affairs Committee of the House of Commons entitled 'Central and Eastern Europe: Problems of the Post-Communist Era' illustrates the different political objectives of the various EC members:

'The interests of all the partners of the EC in the region are not identical. Germany has far stronger cultural and commercial ties with the states of Eastern and Central Europe than does the UK or many other member states. It has been by far the most active trading partner of the countries of Eastern and Central Europe. Some have indeed speculated that the opening up of the region to the west would reduce the interest of Germany in European integration, as the country turned its attention to developing a sphere of commercial, if not political, influence in the east. This does not, for the moment, appear to have happened, although Germany's concerns in the region were strongly demonstrated by its determined advocacy (against the views of many of its EC partners) of independence for Slovenia and Croatia. Greece, too, has its own particular interests in the region, and has been pursuing them vigorously with various proposals for regional groupings in the Balkans.'³²⁶

But it is not only member states of the EC which have an interest in the Yugoslavian issue. Paragraph 53 of the Report acknowledges the political and economical interests of non-member states of the EC, such as Greece, Bulgaria and Albania in whether or not the Yugoslavian territorial unity will disintegrate. In particular, Greece with its Macedonian minority, was afraid that the recognition of the independence of Macedonia might lead their minority of Macedonians to demand the exercise of their right of self-determination. Paragraph 53 of the Report also gives an indication of the historical imperialist rivalry between the imperialist powers such as the UK and Germany:

³²⁵ R. McCorquodale, *supra* note 246 at 600
³²⁶ Paragraph 47

'Germany's enthusiasm for recognition of Croatia and Slovenia has stimulated memories of previous great power conflicts and challenged the developing common foreign policy of the EC.'

The recognition of Slovenia, Croatia and Bosnia-Herzegovina by the European Community States greatly assisted the exercise of the right of self-determination by these peoples.

Although the existence of a people and the existence of their right to self-determination is not dependent upon their recognition as such by the international community, experience has taught that dictates of political and economic expediency more often than not determine whether the existence of a people is recognised and their claim for self-determination is supported.

The Kurdish experience provides a particularly clear example of this reality. In theory, it cannot be disputed that the Kurds qualify as a people as they satisfy all the different criteria posed by the various commentators to qualify as such.

The Kurds are a distinct ethnological group and have inhabited the area called Kurdistan covering parts of present Turkey, Iraq, Iran, Syria and the former Soviet Union since virtually the beginning of recorded history.³²⁷ They have a distinct character,³²⁸ belong to the same race, practise the same religion, speak the same language, are conscious of their separate national identity³²⁹ and have waged a century long struggle to protect their own language, culture, territory and separate identity.

The definition of a 'people' favoured by the Americans, namely a 'community of organisations of life and of tradition'³³⁰ as well as that favoured by the Germans, namely a

³²⁷ L.C. Buchheit, *supra* note 105 at 153

³²⁸ I. Brownlie, *supra* note 115 at 5

³²⁹ Cf Chapter 1 in general

³³⁰ M. Pomerance, *supra* note 216 at 1-2

'community of blood and of origin'³³¹ are both satisfied by the Kurdish nation. Stalin's definition of a nation as a 'historically evolved, stable community arising on the basis of a common language, territory, economic life and psychological make-up manifested in a community of culture'³³² is also satisfied by the Kurds.

In defining the concept of 'people'³³³ it appeared that there was consensus among commentators that a 'people' must exhibit some or all of the following characteristics: a distinctive language, religion or culture; a common history; a commitment or aspiration to maintain its distinctive aspiration in order to maintain its distinctive identity; and an attachment to a well-defined territory.³³⁴ The Kurds satisfy all of these criteria.

As discussed in paragraph 4.1 above, the concept of self-determination has, since its inclusion as an ambiguously formulated principle in the United Nations Charter, developed as part of modern international law, and has now been widely accepted as a collective right of all peoples which is a prerequisite for the existence of individual human rights. It is also accepted that it is a right which belongs to 'peoples' and not to governments or states. As a 'people' the Kurds are therefore entitled to the right of self-determination in all its dimensions. It has generally been recognised and accepted³³⁵ that the right to self-determination has two dimensions: 'external self-determination' which includes the 'establishment of a sovereign and independent state', 'association or integration with an independent state' or 'emergence into any other political status'³³⁶ as well as 'internal self-determination' which is the right of the people to choose a desired form of government.³³⁷ These rights are naturally also available to the Kurdish people.

³³¹ B. Neuberger, *supra* note 1 at 13

³³² H.B. Davis, *supra* note 119 at 71

³³³ Cf Chapter 4 in general

³³⁴ I. Brownlie, *supra* note 127 at 72; R. McCorquodale, *supra* note 246 at 595

³³⁵ See in general the Helsinki Declaration (*supra* paragraph 4.2.1. at 66) as well as the Declaration on Friendly Relations (*supra* paragraph 4.1 at 64-65)

³³⁶ I Brownlie, *supra* note 127 at 595-8

³³⁷ J. E. S. Fawcett, *supra* note 310 at 44

The Kurds have waged a consistent struggle for more than a century in an attempt to exercise their right of self-determination. Why then, has this struggle thus far not yet culminated in the establishment of an independent Kurdistan? The natural riches and the geopolitical importance of the Kurdish territory as well as the political and economical interests of various states have thus far been instrumental in precluding the exercise of the right of self-determination by the Kurds. In what follows, it will become evident that the present day fate of the Kurds is the product of political and economical considerations, which effectively precluded the exercise of the right of self-determination by the Kurds.

On 16 May 1916 a secret agreement, known as the Sykes-Picot agreement, was signed in terms whereof control of Mesopotamia (the area now known as Kurdistan), Palestine and Jordan were awarded to Britain and control over Syria was awarded to France.³³⁸ But Britain was eager to conquer Iraq and Syria. One of the key stages in this conquest was the occupation of the Province of Mosul (in what is now known as Iraqi Kurdistan). This, despite the fact that this particular province should have gone to France in terms of the Sykes-Picot agreement. Britain had carried out many studies and investigations in this Kurdish territory and had discovered that it was rich in oil, a fact which was at that stage unknown to France. Following the British occupation of Mosul, Lloyd George, the British Prime Minister at the time, met with Clemenceau, the French Prime Minister, to settle the resulting controversy. Foreseeing difficulties in the negotiations with France, Britain sought to secure the support of the local Kurdish population with discussions about the creation of an autonomous or independent Kurdistan.³³⁹ France was persuaded to relinquish its rights to Mosul under the Sykes-Picot Agreement in exchange for Cilicia. Unaware of the oil riches of the Province of Mosul, France accepted the British offer.³⁴⁰ When France became aware of the Mosul oil reserves, the integrity of the whole agreement was immediately questioned. New negotiations culminated in the signature of the San Remo Pact on 24 April 1920 which provided that:

³³⁸ H. Kinder & W. Hilgemann, *supra* note 108 at 168

³³⁹ G. Chaliand, *supra* note 27 at 41

³⁴⁰ G. Chaliand, *supra* note 27 at 59

'[T]he British government commits itself to grant the French Government, or parties designated by the latter, a 25% share, at current market prices, in the net production of crude oil which His Majesty's Government may procure from the Mesopotamian oil fields should these be exploited as a Government venture; should the exploitation of the Mesopotamian oil fields be carried out by a private company, the British Government undertakes to provide the French Government with a 25% share of the said company.'³⁴¹

But the Americans, who contributed to Allied victory, was not satisfied with this arrangement - they wanted to share in the spoils. Through negotiations, they eventually obtained a 20% share in Turkish Petroleum, the company which had exclusive exploitation rights to the Mosul and Mesopotamian oil fields.³⁴²

The Ottoman Empire, which had up to that stage sided with the Central Powers was finally defeated by the Allied Powers and collapsed on 30 October 1918. President Woodrow Wilson, in his 'Programme for World Peace' (Point 12), declared that the non-Turkish minorities of the Ottoman Empire should be granted the right of 'autonomous development'. He prescribed that the principle of nationality be adhered to when it came to dealing with non-Turkish countries which were to be detached from the Ottoman Empire. He specifically mentioned Armenia, Kurdistan and Arabia as the three countries which should not be broken up and which should attain statehood under the League of Nations mandate.³⁴³ Articles 62 - 64 of the Treaty of Sevres, which was signed on 10 August 1920 by the Allied Powers and the Turkish Government, specifically stipulated that the Kurds were to be allowed 'local autonomy'. The Treaty³⁴⁴ further provided that if the Kurdish population in certain *designated* areas could demonstrate that a majority of the population in those areas wished to become independent of Turkey and if the Council of the League of Nations deemed them capable of such independence, an independent

³⁴¹ G. Chaliand, *supra* note 27 at 59

³⁴² G. Chaliand, *supra* note 27 at 59

³⁴³ G. Chaliand, *supra* note 27 at 159

³⁴⁴ Article 64

Kurdistan could be established. If the Council did not deem them capable, the Council would call on Britain to assume mandate powers over the area. The prescribed procedure could, however, only be invoked one year after the implementation of the Treaty. It is also worth noting that the fate of the oil rich Mosul Province was not automatically linked to that of the rest of Kurdistan. Only once the hypothetical Kurdistan became a reality, would the population of this Province be consulted as to whether they wanted to join the independent Kurdish state.³⁴⁵

The frontiers of the hypothetical future Kurdistan envisaged by the Treaty arbitrarily excluded many territories with an overwhelmingly Kurdish majority. Approximately one third of the territories of Ottoman Kurdistan were placed under French control whilst approximately another third of the territory was allocated to the Armenian state. Persian Kurdistan (now part of Iran) was also excluded from the proposed state. The Kurdistan envisaged by the Treaty was therefore a country of which approximately two thirds of its territory had been cut off - notably its fertile areas and its traditional grazing grounds. Had the Treaty been implemented, the Kurdish territory would have been divided into five parts: France in the west, Syria in the south, Persia in the east and Armenia in the north, with an independent Kurdistan only in the centre. The truncated state would have been left with mainly the impoverished areas and Britain would control its oil reserves.³⁴⁶

The treaty never came into operation as a result of the subsequent War of Independence, under leadership of Mustafa Kemal. The Kemalist Movement mustered Kurdish support for their cause by proclaiming its intention to free Turkey from Allied occupation and to establish a Turkish Republic in which the Kurdish and Turkish peoples would live as equals and with full ethnic rights. The Kemalists finally defeated the Turkish Government of Constantinople which, as heir to the Ottomans, had signed the Sevres Treaty. This victory forced the Allies to convene the Lausanne Conference in 1922 - 1923 for the purpose of negotiating a new peace treaty with Turkey which was to replace the Treaty of

³⁴⁵ G. Chaliand, *supra* note 27 at 43

³⁴⁶ G. Chaliand, *supra* note 27 at 43-44

Sevres.³⁴⁷ Oil was once again a central topic in the discussions. The two main opposing parties at the conference, Britain and Turkey, were both eager to stake their claims to the oil rich Kurdish territory of the Mosul Province. Ironically enough, the head of the British delegation at the Lausanne Conference, Lord Curzon, was the main shareholder of Turkish Petroleum.³⁴⁸

Each of the two delegations claimed deep concerns for the Kurds in support of their respective theses. Britain argued in favour of the interests and freedoms of the Kurdish people and asserted that the Kurds 'like all the other peoples of the region should enjoy national rights and have its own government'. The Turkish delegation countered this with claims that 'the Turks and Kurds are equal partners in the Government of Turkey', and that 'although Turks and Kurds may speak different languages, these two peoples are not significantly different and form a single bloc from the point of view of race, faith and custom'.³⁴⁹ But the fate of the Kurds and Kurdistan was not the real bone of contention for either the British or the Turkish. As far as they were concerned, the main issue related to a dispute over the frontier between the Republic of Turkey and the Arab Kingdom of Iraq, which was represented by the British Colonial Office.

The Conference culminated in the signature of the Treaty of Lausanne by Britain, France, Italy, Japan, Greece, Rumania, the Serbo-Croat-Slovene state and Turkey on 24 July 1923, which superseded the Treaty of Sevres. The Treaty gave official international recognition to the Turkish state in return for which the Turks accepted a few stipulations demanding respect for and protection of non-Turkish national and linguistic rights. Another significant feature of the Treaty was that it carved up the national territory of the Kurdish people in four parts to divide them between the four most powerful political entities in Western Asia: Turkey, Iran, Iraq and Syria. Although a significant portion of the Kurdish territory was given over to Turkish sovereignty, the Treaty made absolutely no mention of the Kurds and granted them no national rights. The Turkish authorities

³⁴⁷ G. Chaliand, *supra* note 27 at 160 - 161

³⁴⁸ G. Chaliand, *supra* note 27 at 59

³⁴⁹ G. Chaliand, *supra* note 27 at 59

refused to include the Kurdish people amongst the minorities protected by the stipulations, arguing that the Kurds governed Turkey as equal partners with the Turks. Not long afterwards, on 3 March 1924, a Turkish decree banned all Kurdish schools, organizations and publications as well as all Kurdish religious fraternities and organizations.

The Lausanne Conference did not, however, manage to resolve the frontier dispute between Turkey and Britain but merely stipulated that the Turkish-Iraqi frontier was to be fixed along 'a line to be determined in conformity with the decision of the Council of the League of Nations'³⁵⁰. Since the San Remo Pact³⁵¹ there had been rivalry between Britain, France and America about the distribution of shareholding in Turkish Petroleum. The Turkish Government had hoped to play on this rivalry to its own advantage, but in May 1923, shortly before the signature of the Lausanne Treaty, the British, French and American governments finally resolved to distribute the share in Turkish Petroleum (later known as Iraq Petroleum Co.) as follows: 23,75% to Anglo-Saxon Petroleum Co. Ltd (Shell); 23,75 to D'Arcy Exploration Co. Ltd (Anglo-Persian) 23,75% to the French Government; 23,75% to the Near East Corporation (American) and 5% to C.S. Gulbenkian for his services rendered as a mediator in the negotiation process.

Faced with this settlement agreed to between France, Britain and America, Turkey was forced to submit and to accept that the fate of Mosul would ultimately be determined by the Council of the League of Nations. The Council thereafter conducted an enquiry to determine the preference of the Kurds in the area, but on 5 June 1926, just as its verdict was to be announced, Mosul was attached to Iraq and came under British Mandate.

Some seventy years later, the very architects of the division of the Kurds amongst five different nations argue that the dispersal of Kurds justifies the non-feasibility of the exercise of full rights of self-determination by them. In its draft report on the Rights of

³⁵⁰ Article 3 note 2 of the Treaty

³⁵¹ *Supra* pages 17, 122, 126

Kurdish People to the European Parliament, the Committee on Foreign Affairs and Security recognised that:

'...it is the tragedy of the Kurds that their dispersal in lands of strategic and economic importance to several states makes full self-determination impossible to apply.'³⁵²

This statement is in complete conflict with the United Nations resolutions and other international instruments. For example, Article 1, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights provides that '[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources ...'. Likewise, Article 21 of the African Charter of Human and Peoples Rights recognises that:

'All peoples shall freely dispose of their wealth and natural resources. The right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

But the European Parliament's Committee on Foreign Affairs and Security is nevertheless of the opinion that full self-determination is impossible for the Kurdish people as a result of the '*strategic and economic importance* of the Kurdish land to several states'.

By virtue of the fact that Kurds qualify as a 'people', they have the right without external interference freely to determine their political status and to pursue their economic, social and cultural development. Every other state has the duty to respect this right. There is no rule of international law that justifies the subjection of peoples to alien subjugation, domination and exploitation' as a result of the *strategic and economic importance* of that peoples' territory to other states.

³⁵²

J. Gawronski *Draft Report on the Rights of Kurdish People* presented to the Committee on Foreign Affairs and Security of the European Parliament (3 February 1992: PE 155.173/A/rev.), cf Page 3, paragraph H of the Report

Quite the opposite is true: According to the Declaration on Friendly Relations, minority groups and other peoples living in an independent and sovereign state may assert their right of self-determination when the government of the particular state does not represent the whole people belonging to the territory without distinction as to race, creed or colour.³⁵³ In these circumstances, they are even entitled to secede.³⁵⁴ In terms of paragraph 4 of principle 5 of the Declaration, which deals with equal rights and self-determination of peoples,

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

According to the Committee, the fact that it is impossible for full rights of self-determination to apply to the Kurds, makes it imperative that ‘...their individual human rights and their rights to cultural and democratic self-expression should be respected in all the countries where they live.’ There are, however, no rules of international law which recognises that the violation of the *collective rights* of a people makes it imperative that their *individual human rights* should be respected. In fact, in United Nations³⁵⁵ Resolution 637A(VII) of 16 December 1952, the General Assembly recognised that ‘the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights’.³⁵⁶

The Palestinian situation which was discussed above³⁵⁷ is in many respects similar to the Kurdish position. Before the first World War both were dependants of the Ottoman Empire. During the first World war both territories were colonised whereafter the United

³⁵³ Principle 5 (‘The Principle of Equal rights and Self-determination of Peoples’), paragraph 7

³⁵⁴ A. Cassese, *supra* note 135 at 144

³⁵⁵ Cf paragraph 4.1 at 60

³⁵⁶ *United Nations Action in the Field of Human Rights*, *supra* note 168 at 54

³⁵⁷ *Supra* paragraph 5.5.1 at 110

Nations viewed both situations as 'refugee problems'. However, under pressure of the Arab states and the socialist countries the United Nations later changed their stance on the Palestinian problem. On 22 November 1974, in Resolution 3236 (XXIX), the General Assembly recognised that 'Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations' and expressed grave concern that 'the Palestinian people has been prevented from enjoying its inalienable rights, in particular its right to self-determination.'³⁵⁸

Why is it that the United Nations has, up to date, failed to recognise the right of the Kurdish people to self-determination? According to the United Nations the solution to the Palestinian Arab refugee problem was the recognition of their right to self-determination. But the Kurds, who faced genocide in Iraqi Kurdistan was accorded no such recognition. The United Nations solution to the Iraqi Kurdish problem was for the Kurds to become refugees in a so-called 'Safe Haven' in their own land.³⁵⁹ Economic and political considerations were once again regarded as decisive in determining the fate of the Kurds, as was the case with the Sykes-Picot Agreement, the San Remo Pact, the Sevres Treaty as well as the Treaty of Lausanne. Besikci sums up the situation as follows:

'[B]oth conflicts among the imperialist powers and the struggles between them and their local collaborators and the colonialists have taken place in Kurdistan. The purpose of the conflicts was to acquire a larger share of Kurdistan. The establishment of a colonial system in Kurdistan first transformed the conflicts into compromises, then into collaboration. And this collaboration has institutionalised the interstate colonial system.'³⁶⁰

In the Convention on the Prevention and Punishment of the Crime of Genocide³⁶¹, 'genocide' is rendered a crime under international law and is defined as acts 'committed

³⁵⁸ *United Nations Action in the Field of Human Rights*, *supra* note 168 at 60

³⁵⁹ UN Security Council Resolutions 612 and 688

³⁶⁰ I. Besikçi, *supra* note 57 at 3

³⁶¹ 78 UNTS 277, Multilateral treaty dated 9 December 1948

with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.³⁶²

The UNESCO Latin-American Conference, Declaration of San José³⁶³ defined 'ethnocide' as the denial of an ethnic group's 'right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually'.³⁶⁴ The Conference declared ethnocide to be an 'extreme form of massive violation of human rights' which not only violates 'the right of ethnic groups to respect for their cultural identity, as established by numerous declarations, covenants and agreements of the United Nations', but also constitutes 'a violation of international law equivalent to genocide'.³⁶⁵

Since at least the beginning of the twentieth century, Kurds have been victims of these two crimes against humanity. But until 1990 the Kurdish problem has never enjoyed much international attention. However, with the Iraqi invasion of Kuwait on 2 August 1990, the plight of the Kurds at the hands of Saddam Hussein became an international concern. In an attempt to justify Western intervention in Kuwait, member states of the United Nations started unearthing atrocities committed against the Kurds by Saddam Hussein. In the weeks following the Iraqi invasion of Kuwait horrifying stories of a series of chemical weapon attacks by Iraq on Kurdish villages during the late eighties unfolded in the media: pictures of bulldozed Kurdish villages, mass graves, injured and maimed victims of poison gas attacks by Iraq on Kurdish villages covered the front pages of many newspapers and magazines. Iraq's chemical arsenal and the regime's proven willingness to use it against the Kurds were widely publicised during this period.

To name but a few of the reported incidents:³⁶⁶ In 1987 the 16 villages of the Balisan Valley in the Sulaimaniya province were attacked by Saddam with chemical gas. Two thousand Kurdish civilians died. The villages were afterwards razed by demolition teams

³⁶² J. Crawford, *supra* note 115 at 180-181

³⁶³ UNESCO Doc FS 82/WF.32 (1982), 11 December 1981

³⁶⁴ See J. Crawford, *supra* note 115 at 202-204 for the full text of the Declaration

³⁶⁵ Cf paragraph 1 of the Declaration

³⁶⁶ R. Nordland 'Saddam's Secret War' *Newsweek* (10 June 1991) 16 at 18

in bulldozers. On 16 April 1987, the Kurdish village of Sheikh Wasanan with its 800 inhabitants was attacked by Iraqi aeroplanes dropping chemical bombs. In March 1988 5000 Kurdish civilians were killed in the chemical bombing of Halabjah by Iraq³⁶⁷ and approximately 10 000 people were permanently injured and maimed. Five months after the Halabja genocide the Iraqi defence minister, Hayrullah Tilfah, declared: 'It is our right to use these weapons. Chemical weapons were produced for the purpose of using it. It is our right to decide how to treat our peoples'.³⁶⁸ In 1989, Iraqi attacks on the city of Qalaa Diza demolished every one of the city's 15 000 buildings. Conservative US aerial reconnaissance estimates of the destruction put the number of Kurdish villages destroyed by Iraq during 1988 to 1990 in the region of 3 000 or more, several hundred of which had been gassed. According to blood and urine samples from victims examined by Western scientists, the villages were typically bombed with a combination of mustard gas and nerve gases such as Tabun and Sarin.³⁶⁹³⁷⁰ During this time more than 100 000 people disappeared and their disappearance remains unresolved.³⁷¹

At the time when the chemical weapon attacks on Kurdish villages were being perpetrated by Iraq, the Western politicians were strangely subdued as Saddam Hussein was at the time a large scale trading partner of the West in his attempt to reconstruct his country after the protracted war with Iran. Sadly, the absence of pressure or co-sponsorship by the main Western powers usually determines the passage of a resolution by the United Nations. Nowhere was this more clear than the 1989 session of the Human Rights Commission: the West continued its indulgence of atrocities committed against the Kurds by Saddam Hussein and the US conspicuously refrained from co-sponsoring a resolution to condemn Iraqi chemical warfare against the Kurds.³⁷² But at the end of 1990, when the West sought to justify their intervention in Kuwait, the plight of the Kurds was a very

³⁶⁷ M. van Bruinessen, *supra* note 5 at 43

³⁶⁸ Halepçe'den Kamplara...Kürtler... (Istanbul: Alan-Belge *et al*, 1990) 8

³⁶⁹ Cf R.Cook-Deegan, H. Hu & A. Shukri 'The Use of Chemical Weapons: Conducting an Investigation using Survey Epidemiology' (1989) Vol 262 No 5 *JAMA* 640-643; D. Ala'Aldeen *et al* 'Poisoning of Kurdish refugees in Turkey' (1990) Vol 335 *Lancet* 287-288

³⁷⁰ 'Iraq has "tons" of Chemical Weapons' *Cape Times* (20 April 1991) 3

³⁷¹ *Amnesty International Report 1994* (London: Amnesty International Publications, 1994) at 167

³⁷² 'Human Rights omissions and too quiet diplomacy' *Guardian Weekly* (15 March 1992) 12 at 12

convenient vehicle with which to portray Saddam Hussein as a monster. The documentation of human rights abuses against Kurds which had hitherto been hidden away, was conveniently aired at a time which suited the political strategy of the West. After the West had attained its goals, the Kurdish issue would once again be pigeon-holed for future use as a negotiation tool between different states.

A series of UN resolutions gave a US-led coalition of more than 30 countries freedom to liberate Kuwait. The US originally had little choice but to mobilise the world community for fear that Saddam Hussein might also invade oil rich Saudi Arabia. The consequences would have been devastating for Western industries and consumers. Another motivating factor for the large scale mobilisation against Iraq was the fear that Saddam Hussein might start utilising his chemical and biological weapons, weapons of mass destruction, against the very countries which supplied it to Iraq during the 9 year long Iran-Iraq war. But America also made it very clear that their only objective was the liberation of Kuwait. To the dismay of the Kurds, the Bush administration was not prepared to intervene in the domestic affairs of Iraq and reiterated that the civil war in Iraq would not draw any US military response.³⁷³

On 26 February 1991, after a ground war of more than 100 hours, Allied powers took control of Kuwait. The Iraqi defeat in Kuwait fostered hopes that Saddam's regime would fall and in March 1991 the Iraqi Kurds rose up in rebellion. In an attempt to suppress this rebellion, Iraq attacked the rebellious towns with bombardments of phosphorus and sulphuric acid. More than two million Kurds fled their homes towards the mountains and the Turkish and Iranian borders.³⁷⁴ Britain proposed the setting up of an enclave in northern Iraq as a safe haven for Kurdish refugees,³⁷⁵ citing the 1948 Convention on Genocide in terms whereof any party can ask the United Nations to take

³⁷³ 'We Never Promised Anything' Vol. 144 No. 15 *The Guardian Weekly* (14 April 1991) 17 at 17

³⁷⁴ 'UN buffer zone: Safety for Kurds in south but misery for others' *The Argus* (15 April 1991) 3 at 3

³⁷⁵ 'Iraq gunships "massacre" fleeing Kurds' *Cape Times* (9 April 1991)

action 'for the prevention and suppression of acts of genocide.'³⁷⁶ This was supported by all the leaders of the European Community. As a result, a 'no fly' zone was established north of the 36th parallel, which Saddam's military aircraft were barred from entering.³⁷⁷ Western powers then set about demarcating safe havens for the Kurds under 'Operation Provide Comfort'.³⁷⁸ Kurdish refugees returned *en masse* and in 1992 elections were held for the purpose of establishing a national assembly. The outcome of the elections was the formation of the Kurdistan Regional Government, which was essentially a government of national unity consisting of the two leading Iraqi Kurdish parties - the Kurdish Democratic Party (KDP) led by Massoud Barzani and Jalal Talabani's Patriotic Union of Kurdistan (PUK). But historically there has been much rivalry between these two parties, and the intra-Kurdish civil conflict has traditionally been exploited by both Iran and Iraq for their own ends. PUK, which has traditionally occupied that part of northern Iraq bordering Iran, has been deprived by the KDP of revenue and foreign access through Turkey, which led them to become more dependent on Iran. This dependence has led Iran to use Iraqi Kurds as pawns in its perennial rivalry with Iraq. In July 1995 Iran sent a column of 2 000 Revolutionary Guards some 250 kilometres into Iraqi Kurdistan in an attempt to capture the leadership of the Iranian Democratic Party of Kurdistan.³⁷⁹ None of the Western powers objected. Iranian aid to Iraqi Kurds has been entirely self-serving, namely with the view of opening for themselves a gateway into Iraq to enable them to hunt down the Iranian Kurdish dissidents in an attempt to preclude the establishment of an independent Kurdistan which might harm Iranian sovereignty. Turkey has launched similar offensives into Iraqi Kurdistan, the most recent of which occurred during 1995. During this invasion, which formed part of Turkey's military campaign against separatist Kurds, approximately 35 000 Turkish troops penetrated some

³⁷⁶ 'Britain proposes safe haven for the Kurds' Vol. 144 No. 15 *The Guardian Weekly* (14 April 1991) 1 at 1

³⁷⁷ J. Randal & J. Mintz 'Faction fight that sparked the US strike' *Mail & Guardian* (September 6 to 12 1996) 18 at 18

³⁷⁸ L. Benjamin 'No Friends but the Mountains: Kurds' disunity lets regional powers exploit their struggle for autonomy' *The Sunday Independent* (8 September 1996) 11 at 11

³⁷⁹ C. Kutschera 'Invoicing the future' No 262 *The Middle East* (December 1996) 8 at 9

40 km into Iraq in pursuit of members of the Kurdistan Workers Party (PKK).³⁸⁰ This effectively made a mockery of the allied 'safe haven' created for Iraqi Kurds after the Gulf War. The United States of America endorsed this invasion in view of the fact that it appeared to conform with the right of self-defence, i.e. Turkey's right to protect itself against attacks from a neighbouring country, if that neighbouring state is unwilling or unable to prevent the use of its territories for such attack.³⁸¹ It is interesting to note that America endorsed the violation of Iraqi sovereignty - something which they were so vehemently opposed to when called upon to intervene in the civil war in Iraq after the Gulf War. Another motivation for the low key approach taken by America during this offensive, was the hope of Turkish co-operation in helping prevent any expansion of the Balkan war.

Iraq, on the other hand, has also used the Kurdish civil conflict as a means of reimposing Saddam Hussein's rule in the northern part of Iraq, as well as for the purpose of asserting his regime's right to protect Iraq's territorial integrity.³⁸²

The ever present tension between KDP and PUK came to a head in 1996 when the KDP accused PUK of accepting arms and other help from neighbouring Iran. Barzani's KDP, which is aligned with Saddam Hussein, requested Iraqi intervention to ward off the foreign threat from Iran. Iraq heeded and on 31 August 1996, Saddam Hussein sent 30 000 Iraqi troops and 400 tanks to help the KDP displace the PUK from Arbil, the regional capital of Northern Kurdistan.³⁸³ Iraqi interference in the safe haven patrolled by United States and other international warplanes, presented a direct challenge to the United States of America and prompted them to launch cruise missile attacks on military targets in a stated move to punish the Iraqi military.³⁸⁴ The US action was short and sharp and US president Bill Clinton described their objective as 'limited but clear: to make Saddam pay a price for the

³⁸⁰ 'Turk planes continue to bomb Kurds', *supra* note 79; see also 'Turkish army prepares for extended campaign' *Business Day* (23 March 1995)

³⁸¹ J. Rugman *et al* 'Nato disarray over Turkey' *Mail & Guardian* (24 March 1995)

³⁸² L Benjamin, *supra* note 378 at 11

³⁸³ 'Provocation and response' *The Economist* (September 7th - 13th 1996) 39

³⁸⁴ J. Randal & J. Mintz, *supra* note 377 at 18

latest act of brutality, reducing his ability to threaten his neighbours and the US's interest.³⁸⁵ According to US Defence Secretary, William Perry, '[t]he issue is not just the attack on Arbil. It is the clear and present danger Saddam poses to his neighbours, to the stability of the region, and to the free flow of oil.'³⁸⁶ American concern for the fate of the Kurds in the Iraqi 'safe haven' only extended insofar as it impacted on the United States' interest in the *free flow of oil*. Once again the dictates of political and economic expediency precluded any sincere attempt to solve the Kurdish issue.

From what was said above, it is clear that the Kurdish issue is not just a simple violation of individual human rights or minority rights. It is the denial of the existence of the Kurds as a people and of the existence of their right of self-determination. This was attained through the division and colonisation of the territory known as Kurdistan in a manner which best served the political and economical interests of states such as Turkey, Iran, Iraq, Syria, Britain, France and America. It is ironic that these nationalists are not willing to concede to others what they so vehemently demand for themselves: statehood.



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WESTERN CAPE

³⁸⁵ M. Shahin & M. Walker 'Desert Strike against Saddam' *Mail & Guardian* (September 6 to 12 1996) 18 at 18

³⁸⁶ M. Shahin & M. Walker, *supra* note 385 at 18; 'The Washington Wobbler v The Baghdad Bruiser' in *Mail & Guardian* (September 6 to 12 1996) 58 at 58

Nations viewed both situations as 'refugee problems'. However, under pressure of the Arab states and the socialist countries the United Nations later changed their stance on the Palestinian problem. On 22 November 1974, in Resolution 3236 (XXIX), the General Assembly recognised that 'Palestinian people is entitled to self-determination in accordance with the Charter of the United Nations' and expressed grave concern that 'the Palestinian people has been prevented from enjoying its inalienable rights, in particular its right to self-determination.'³⁵⁸

Why is it that the United Nations has, up to date, failed to recognise the right of the Kurdish people to self-determination? According to the United Nations the solution to the Palestinian Arab refugee problem was the recognition of their right to self-determination. But the Kurds, who faced genocide in Iraqi Kurdistan was accorded no such recognition. The United Nations solution to the Iraqi Kurdish problem was for the Kurds to become refugees in a so-called 'Safe Haven' in their own land.³⁵⁹ Economic and political considerations were once again regarded as decisive in determining the fate of the Kurds, as was the case with the Sykes-Picot Agreement, the San Remo Pact, the Sevres Treaty as well as the Treaty of Lausanne. Besikci sums up the situation as follows:

[B]oth conflicts among the imperialist powers and the struggles between them and their local collaborators and the colonialists have taken place in Kurdistan. The purpose of the conflicts was to acquire a larger share of Kurdistan. The establishment of a colonial system in Kurdistan first transformed the conflicts into compromises, then into collaboration. And this collaboration has institutionalised the interstate colonial system.'³⁶⁰

In the Convention on the Prevention and Punishment of the Crime of Genocide³⁶¹, 'genocide' is rendered a crime under international law and is defined as acts 'committed

³⁵⁸ *United Nations Action in the Field of Human Rights*, *supra* note 168 at 60

³⁵⁹ UN Security Council Resolutions 612 and 688

³⁶⁰ I. Besikçi, *supra* note 57 at 3

³⁶¹ 78 UNTS 277, Multilateral treaty dated 9 December 1948

6. CONCLUSION

The right of self-determination has been shown to have been forged on the anvil of battle between oppressed people and imperialist states. Formalised in the French revolution for the first time, it heralded a period of protracted tension between states and their subjects, states and their territories and between people and their territories. Nationalism and the struggle for self-determination has dominated politics for the last two centuries, as powerful states and people desperately struggle for control over resources and territory in a world shrinking in the face of industrial advance and burgeoning needs.

The entropic decay of the old feudal states in the wake of the industrial revolution saw the phoenix of new republics rise up on the wings of change and in their turn oppress and conquer and colonise new territories to fuel their economies. The premise of democracy so fundamental to these new states had to filter through to their subjects who in turn rose up and fought against them for their liberty. The decay of the Ottoman Empire saw a parallel rise of nationalism in its territories: the Kurds, like the Young Turks, battled for their 'state'. As the European Nations became embroiled in conflict they required allies in all quarters. With Machiavellian intent during the first World War, the Kurds were promised their territory.

Unfortunately this was not to be: The turn of the twentieth century saw that most innocuous of substances, petroleum, become a commodity of immense world significance. Sadly for the Kurds, oil was in great abundance in Kurdistan, and these deposits were discovered by the British. Those specialists in imperial strategy realised soon enough that control of this oil rich area over the long term would be impossible. With the Ottoman empire lying prostrate at the end of the First World War and Woodrow Wilson's principle of self-determination of peoples briefly in the ascendant at Versailles, as mentioned, the Kurds were promised a state of their own. But between the 1920 Treaty of Sevres, which contained the promise of a Kurdish state, and the 1923 Treaty of Lausanne, which ratified

the new borders of Turkey, the Kurdish hopes were betrayed. From 1923 onward, Kurdistan was parcelled out to the five surrounding countries, i.e. Turkey, Persia, France's mandate Syria, Britain's mandate Iraq and the former USSR in a series of treaties which ensured that a handsome percentage of the petrol profits would fall in the hands of Britain, France and the United States of America. These treaties also ensured that the powerful watershed of the Tigris and Euphrates would not fall under the control of the people who actually lived there but that it would be administered by occupying authorities so as to control the nations further downstream who might have oil but no water. It also ensured that control of this strategic geographical nexus as well as the geological and mineral rights to this area would never be in the hands of the people whose land it is.

The effect of these treaties was that the Kurds would be a perpetual minority group in all of these countries and hence impotent in the face of that modern political trend: democracy. Subject to the will of the majority in whichever country they find themselves, the Kurds have thus far been unable to realise their dream of an independent Kurdistan in view of the combined opposition of successive regimes in Iraq, Iran and Turkey.

Since the founding of the Turkish state in 1923, the Kurds have always been regarded as a threat to the unity of the Turkish State. After having formalised the relations between the newly established Turkish Republic and the West in the 1923 Treaty of Lausanne, the Turks turned against the Kurds and set about forcibly assimilating them - denying their very existence and banning the Kurdish language, culture and identity.

In contrast to the Kurds, Palestinians with the backing of Arab countries achieved recognition. So too did Israel with Western support. African, Asian and other former colonies also saw the recognition of their rights of self-determination and their freedom from colonial rule with the support of Socialist and newly independent states. But no-one has of yet come forward to support the Kurds. In fact, everyone is terribly concerned about maintaining the *status quo* of a divided, non-existing Kurdistan.

Some seventy to eighty years after the parcelling out of Kurdistan, the Kurds now number 30 million: the largest ethnic group in the world without their own state. Their struggle to establish an independent Kurdistan dates back more than a century, but has to date, not yet culminated in statehood. The aim of this thesis was to investigate whether the Kurds' aspirations for the establishment of an independent Kurdistan have any basis or justification in international law. During the course of this study, regard was had to the history of the Kurdish nation, the content and development of the concept of self-determination, the status of the concept in international law as well as who qualifies as claimants of the right to self-determination.

In theory, it cannot be disputed that the Kurds qualify as a 'people' as they satisfy all the different criteria posed by the various commentators to qualify as such.³⁸⁷ It was also demonstrated how the concept of self-determination has, since its inclusion as an ambiguously formulated principle in the United Nations Charter, developed as part of modern international law, and how this development has culminated in the modern day acceptance that self-determination is a collective right of all peoples which is a prerequisite for the existence of individual human rights.

Evaluated against objective principles of international law, the Kurds are therefore entitled to the right of self-determination in all its dimensions. In view of the fact that Kurds qualify as a 'people', they have the right without external interference freely to determine their political status and to pursue their economic, social and cultural development. Every other state has the duty to respect this right.

Unfortunately for the Kurds, they inhabit an area which is enormously rich in the two great natural resources of oil and water, and to compound the problem their homeland is the meeting point of four of the most aggressive and expansionary nationalism in the modern world: Turkish, Iranian, Iraqi and Syrian. Sadly, the natural riches and the geopolitical importance of the Kurdish territory as well as the political and economical interests of

³⁸⁷ Cf Chapter 4

various states have thus far been the main impediments to the exercise of the right of self-determination by the Kurds. The notion of an independent Kurdish state has been vehemently opposed by the surrounding states as well as Britain, France and America due to their peculiar economical interests in the area.

Kurdish yearnings for an independent state have been nourished by more than one generation of outside powers seeking to advance their own subjective interests by attempting to play chess with the seemingly endless struggle in the Middle East borderlands - a game in which the Kurds have been the unfortunate pawns and the victims of ethnocide, genocide and systematic human rights abuses.

As stated earlier,³⁸⁸ the existence of a 'people' and the existence of their right to self-determination is not dependent upon recognition as such by the international community. The viewpoint of the different states and their respective political and economical objectives should not come into play when one has to determine whether such a right exists or not. Whilst the recognition of a 'people' may greatly assist the exercise of the right of self-determination, such recognition cannot be seen as a prerequisite to either the existence of a 'people' or of their right of self-determination.³⁸⁹ The harsh reality of the Kurdish experience has taught that dictates of political and economic expediency more often than not determine whether the existence of a people is recognised and their claim for self-determination is supported. But the truth is that there is no rule of international law that justifies the subjection of peoples to alien subjugation, domination and exploitation' as a result of the *strategic and economic importance* of that peoples' territory to other states.

Measured against objective principles of international law, the Kurdish nation is entitled to the right of self-determination. The continuous denial of this right with all its constituent dimensions can only be justified according to an international law without any sense of

³⁸⁸ Cf Chapter 4

³⁸⁹ R. McCorquodale, *supra* note 246 at 595

justice in which the economical interests of certain world powers enjoys precedence over fundamental human rights.



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7. APPENDIX A



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