

Inquiring the Meaning of ‘Peoples’ Under the Right to Self-Determination: The Case of Patani People in Southern Thailand

by

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Inquiring the Meaning of ‘Peoples’ Under the Right to Self-Determination: The Case of Patani People in Southern Thailand

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ABSTRACT

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This thesis examines the definition of peoples who may claim the right to self-determination. It also inquiries into situations where peoples may claim the right to self-determination, which is usually associated with the right to be free from colonial power. To that end, this thesis focuses on the Patani people in Southern Thailand. This research is carried out via in-depth analysis of statutes, cases, and interviews with local leaders, which further illustrates the need for a legal definition of peoples under international law. This thesis argues that the Patani people satisfy the criteria of a people based on the similarity characteristics of history, language, culture, and religion, connection to the territory and their consciousness as a distinct people. Even though the Patani people are not a colonial people under the definition of international law, the right of self-determination is guaranteed to them as Indigenous people and Minorities. Furthermore, if an element of oppression exists, Patani people have the full right to exercise the right of self-determination in terms of social, cultural, and economic development under international law.

Keywords: right to self-determination, Patani people, decolonization, international law, human rights law

ÖZETÇE

Yüksek Lisans Tez Başlığı

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Bu tez, kendi kaderini tayin hakkını talep edebilecek halkların tanımını incelemektedir. Ayrıca, halkların kendi kaderini tayin hakkını talep edebilecekleri durumları da araştırır, bu da genellikle sömürgeci güçten kurtulma hakkıyla ilişkilendirilir. Bu amaçla, bu tez Güney Tayland'daki Patani halkına odaklanmaktadır. Bu araştırma, tüzüklerin, davaların ve yerel liderlerle yapılan röportajların derinlemesine analizi yoluyla gerçekleştirilmekte ve bu da uluslararası hukuka göre halkların yasal bir tanımına duyulan ihtiyacı daha da göstermektedir. Bu tez, Patani halkının tarih, dil, kültür ve din gibi benzerlik özelliklerine, toprakla olan bağlantısına ve ayrı bir halk olarak bilincine dayanan bir halkın kriterlerini karşıladığını savunmaktadır. Patani halkı, uluslararası hukuk tanımına göre sömürgeci bir halk olmasa da, Yerli halk ve Azınlıklar olarak kendi kaderini tayin hakkı onlara garanti edilmektedir. Ayrıca, bir baskı unsuru varsa, Patan halkı uluslararası hukuka göre sosyal, kültürel ve ekonomik kalkınma açısından kendi kaderini tayin hakkını kullanma hakkına sahiptir.

Anahtar Kelimeler: kendi kaderini tayin hakkı, Patani halkı, dekolonizasyon, uluslararası hukuk, insan hakları hukuku

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ABBREVIATIONS

ALRC	Australian Law Reform Commission
BIPP	Barisan Islam Pembebasan Patani
BNPP	Barisan Nasional Pembebasan Patani
BRN	Barisan Revolusi Nasional
CSCST	Civil Society Council of Southernmost Thailand
CSO	Civil Society Organization
GAMPAR	Gabungan Melayu Patani Raya
GMIP	Gerakan Mujahidin Islam Patani
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	The International Court of Justice
ILO	International Labor Organization
MARA	Majils Syura Patani

NLF	National Front for the Liberation of Patani
PCC	Patani Consultative Council
PULO	Patani United Liberation Organization
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNC	Unilateral Non-Colonial
UNCIO	United Nations Conference on International Organization
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNHCR	United Nation High Commissioner for Refugees
US	United States
USSR	The Union of Socialist Republics

Chapter 1: INTRODUCTION

1.1 Research Background

Since becoming part of international law, the right to self-determination has always been controversial. Klabbers asserted that the right to self-determination is one of the most contentious issues in international law.¹ It has been open to debate as to who can claim this right of self-determination and the criteria for the people to claim this right under international law. As per Cassese's observation, 'confusing state practice' and 'contradictory resolutions' have made the application of the right to self-determination unclear.² The principle of self-determination, as Cassese opined, dates to the French Revolution in 1789 and the American Declaration of Independence in 1776.³ However, in the 19th century, 'a legal norm of self-determination grew', partially because of how the international community reacted against colonialism.⁴

Due to its controversial nature, it is essential to investigate how the right to self-determination developed in history. As Isaiah Berlin proclaimed, "Political liberty in this sense is simply the area within which a man can act unobstructed by others."⁵ People would prefer to choose their leader among their ranks to such an extent that a dictator would be tolerable rather than being ruled by others, even if it would provide a better alternative. According to Klabbers, it is in our inherent nature to be free. Hence being told what to do and not to do would deprive one of political liberty. Klabbers explained that "[b]eing governed from the outside would imply less than fully free and, therewith being less than fully human."⁶ As McCorquodale commented, to be human is to be given respect

¹ Jan Klabbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, 28 HUMAN RIGHTS QUARTERLY 186 (2006).

² CASSESE, *supra* note 10 at p. 2.

³ TOM SPARKS, SELF-DETERMINATION IN THE INTERNATIONAL LEGAL SYSTEM: WHOSE CLAIM, TO WHAT RIGHT? 1, 63 (2023) citing Cassese, *id* at 11.

⁴ *Id* at 87.

⁵ ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY, 156 (1969).

⁶ Klabbers, *supra* note 1 at p. 187.

and freedom among themselves to choose their leader. A leader chosen among families, communities, and society and not from outside is different from their own community.⁷

However, Hannum refuted the above argument, contending that it solely depends on the notion of demand of the peoples. This demand is only considered when such right is aligned with the “geopolitical and strategic interest of the Great Powers.”⁸ In the 18th and 19th centuries, as nationalism grew, the idea of self-determination for “national” groups emerged as an inevitable byproduct. Initial aspirations for more autonomy or local self-government frequently evolved into demands for complete independence as the central authorities of the Ottoman, Austrian, German, and Russian empires pursued more assimilationist policies, or started to lose strength militarily and politically.⁹ Pearson believes that external assistance from one or more of the Great Powers was crucial to the success or failure of claims of minority rights, or self-determination in the late nineteenth century.¹⁰ That support was as significant during the Paris Peace Conference. Political calculations and the perceived demands of the Great Powers were considerably more important than adhering to the claims of peoples which had the strongest claims to self-determination.

Nonetheless, Klabbers considered this right to act as a beacon of light for some people to fight for justice.¹¹ At the same time, it may be claimed by others to justify breakup and secession.¹² Robert Lansing, secretary to Woodrow Wilson, discouraged such discussion of the principle of self-determination. According to him, despite its benign intentions, it had been dismissed by nations after its pronouncement by Wilson. The discouragement is justified by the reasons of national safety and territorial integrity.¹³

⁷ Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 857, 859 (1994). See HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES, (J. Berting, Netherlands, & Roosevelt Study Center eds., 115 & 125 1990).

⁸ HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS, 28 (1996).

⁹ *Id* at p. 28 para 2.

¹⁰ RAYMOND PEARSON, NATIONAL MINORITIES IN EASTERN EUROPE, 1848-1945, 1, 84 (1983).

¹¹ Klabbers, *supra* note 1 at p. 192.

¹² *Ibid* at p. 187.

¹³ ROBERT LANSING, THE PEACE NEGOTIATIONS: A PERSONAL NARRATIVE, 104 (1991). See his quote, “Since the time that the principle was proclaimed, it has been the excuse for turbulent political elements in various lands to resist established governmental authority; it has induced the use of force in an

Renowned legal scholar Antonio Cassese remarked, “Self-determination is attractive so long as it has not been attained; alternatively, it is attractive so long as it is applied to others. Once realized, enthusiasm dies fast since henceforth it can only be used to undermine perceived internal and external stability.”¹⁴

To further the discussion, Cass provided us with several definitions of self-determination.¹⁵ First, according to Amberg, as the founding father of the principle of self-determination, President Woodrow Wilson introduced the concept in the League of Nations, which contained three elements: the right of the people to elect their sovereign, not being subservient under any alien masters, and not transferable to others.¹⁶ Second, Amberg referred to Professor Louis Henkin, who believes that self-determination is exclusively reserved for colonial people, of an international recognition to decide their own fate whether of independence or association with other states.¹⁷ The third definition, from John A. Collins, is much more nuanced: right of a group that has a consensus on their objectives, freedom to determine the mode of their government, and freedom to determine their “economic, social and cultural status.”¹⁸ Nonetheless, Cass ultimately chose to accept the three elements in the dissenting opinion of Judge Dillard in the *Western Sahara Case*.¹⁹ First, it must be claimed by a group. Second, the objective must be concerned with political aims. Third, the political objective must be decided by them.²⁰

Hence, the question that arises when examining self-determination is why this right is so fundamentally important to address under the framework of International Law. As McCorquodale observed, the majority of armed conflicts of ethnic clashes and national groupings stem from confrontation “between groups in a State or between a group and

endeavor to wrest the sovereignty over a territory or over a community from those who have long possessed and justly exercised it.”

¹⁴ ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 1, 5-6 (1995).

¹⁵ Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 23-25 (1992).

¹⁶ See Eric M. Amberg, *Self-Determination in Hong Kong: A New Challenge to an Old Doctrine*, 22 SAN DIEGO L. REV 839, 842 (1985) for exact quotation.

¹⁷ *Id* at p. 24.

¹⁸ Eric M. Amberg, *supra* at p. 24 quoting John A. Collins, *Self Determination in International Law: The Palestinians*, 12 CASE W. RES. J. INT'L L. 137, 138 (1980).

¹⁹ *Western Sahara Case*, 1975 I.C.J. 12, para. 57 (Oct. 16).

²⁰ Deborah Z Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18, 24 J. INT'L L. & COM.

the State”.²¹ Thus, if the international community remains noncommittal on the right to self-determination, such conflicts may be prolonged worldwide.²² Secretary General of the United Nations, Boutros-Ghali in 1992 commented, “if every ethnic, religious or linguistic group claimed Statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would be ever more difficult to achieve.”²³ McCorquodale states there is a calling for international lawyers to devise a sound and coherent legal framework to balance protecting such rights while strengthening international peace and security.²⁴

There is a plethora of uncertainties with this principle or right of self-determination. Cass raised the question of the contemporary status of this right of self-determination under international law.²⁵ Does it stand as a mere principle in the international politics, legitimacy to secede, or has it become part and parcel of the norms under international law? Is there a way to define a people? Is it confined to the colonial case, or can it be claimed for all minorities in their respective states? Klabbers had formulated an eloquent dilemma for those discussing self-determination. He argues: “Yes, the right exists, and it applies to entity ‘X’... even if entity X may have a right to self-determination, that does not mean that it may exercise its right to self-determination.”²⁶ The answer is not a straightforward one and is itself a paradox.

1.2 Statement of the Problem

This thesis explores the evolving nature of self-determination, particularly the definition of ‘people’. According to Cassese, the literal text of Article 1 of the International Covenant on Civil & Political Rights²⁷ and the International Covenant on Economic, Social and Cultural Rights²⁸ does not solve the dilemma above. Both Covenants in Article 1 state the following: “All peoples have the right of self-

²¹ McCorquodale, *supra* note 4, at 857.

²² *Id* at p. 857.

²³ Boutros Boutros-Ghali, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, 11 INTERNATIONAL RELATIONS 201, 204 (1992).

²⁴ McCorquodale, *supra* note 4, at p. 858.

²⁵ Cass, *supra* note 13 at p. 24.

²⁶ Klabbers, *supra* note 1 at p. 188.

²⁷ International Covenant on Civil and Political Rights, 999 UNTS 171 (1966).

²⁸ International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (1966).

determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.”

Hannum explains that the question of what the ‘people’ meant in the ‘self’ definition has been raised previously in the General Assembly Resolution 2625, the Declaration on Colonial Countries & Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States under the Charter of the United Nations. The following question was whether the right of self-determination could be applied outside the colonial situation.²⁹ Hannum opined that ICCPR and ICESCR do not give adequate answers and might add to the existing confusion.³⁰

The continuing problem of ‘defining the people’ is also known as the ‘Wilsonian dilemma’. Pomerance articulates that “from whichever angle the question of defining the “self” within the new “UN Law of Self-Determination” is approached ... the Wilsonian dilemmas have persisted. Except for the most obvious cases of “decolonization”, an objective criterion has not been properly developed or applied for preferring one claim over another or for delimiting which population belongs to which territory.”³¹

This thesis attempts to study whether the right to self-determination applies beyond the boundaries of colonial context. According to Hannum, although the self-determination of “all” peoples is mentioned in General Assembly Resolutions 1514 and 2625 as well as the two Covenants, so far, the right to self-determination has only been applied to colonial conditions with consensus.³² This is supported by McCorquodale³³, with Cass according to the “Conventional’ view, and Klabbers, who confirms without debate.³⁴ Nonetheless, all commentators seem to differ on its evolvement in the post-colonial period to varying degrees.

²⁹ HANNUM, *supra* note 8 at p. 34.

³⁰ *Id* at 35.

³¹ MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS (1982) quoted in *Id* at p. 39.

³² HANNUM, *supra* note 5 at p. 46.

³³ McCorquodale, *supra* note 4 at p. 860.

³⁴ Klabbers, *supra* note 1 at 189.

The case study selected for this research is the Patani people. The Patani people are unique in that they are a Malay people who ruled under different majority people of Siam. The Patani Malays existed in the first century Kingdom of Langkasuka which later became the Sultanate of Patani in the 15th century. Its original territory encompassed Patani, Yala, Narathiwat, part of Songkhla in Thailand as well as Kelantan and Terengganu, which have currently merged with Malaysia. The Sultanate of Patani was conquered by Siam-Thai Kingdom in 1786 and forced to comply as a vassal state, similar to the Sultanate of Kedah. In 1902, the last King of Patani was forced to abdicate and accept Thai people as part of its region. As a result of the 1909 Anglo-Siamese treaty, the Patani people officially separated from the Malay peninsula.

Maguire believes that scholars such as Hannum and Pearson argued that decolonization was completed during the peak decolonization process.³⁵ As colonizers dismantled and powers weakened, various regions gained independence following the establishment of the United Nations. However, Patani was not among them as it had been deemed part of Siam Kingdom by the British Empire since the Treaty of Burney in 1826 and 1909.³⁶ It was acknowledged without a local ruler representation or approval of the people. Despite Patani's request for independence and integration with Malaysia by the British, it was ignored. Soon after, the Patani territory was militarily annexed by Siam, and later incorporated into modern-day Thailand as one of its regions.

Despite Thai government's recent moderate cultural assimilation, the Patani people have maintained political and military opposition since the last Patani King was ousted in 1902, expressing their desire for self-governance, to be recognized for their distinct identity, and separate religion and culture. Historically, the Patani people shared similar culture, religion, and language with other northern Malaysian states during the Patani Kingdom rule. They were denied the chance to claim independence and to integrate into

³⁵ Amy Maguire, *Contemporary Anti-Colonial Self Determination Claims and the Decolonisation of International Law*, 22 GRIFFITH L. REV. 238 (2013) quoting Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1 (1993) at p. 31; Noel Pearson, *Uses of Layered Identities*, THE AUSTRALIAN, Nov. 18, 2006.

³⁶ Ahmad Amir Bin Abdullah, *Southern Thailand: Some Grievances of the Patani Malays*, 4 JOURNAL OF INTERNATIONAL STUDIES 102 (2008). See note 2, The Burney Treaty was signed between Siam and the British in 1826 and acknowledged Siamese rule over northern Malay states of Kedah, Kelantan, Perlis and Terengganu." It was superseded by Anglo-Siamese Treaty 1909 which Siam had transferred all the above states mentioned to the British except Patani and Satun.

Malaysia in 1957. They were isolated and forced to join the central government in Bangkok. The forced annexation in 1786 had given rise to insurgency and turbulent periods of instability that lasted till post-WWII. Insurgency and rebel operations are still ongoing against the central government of Thailand in Bangkok and Southern Thailand.

1.3 Research Objectives

This thesis investigates the case of the Patani people in Pattani, Yala and Narathiwat and four districts in Songkhla, all located in Southern Thailand and their qualification as a people under international law and the right to self-determination.

The first objective of this thesis is to study whether Patani based on criteria available under international law, is a people under the right to self-determination. It aims to embark on specific legal research on the qualification of Patani people as “peoples”.

The second objective of this thesis is to examine whether the Patani is a colonial people under international law and right to self-determination. If proven otherwise, to what extent does Patani people can claim their right.

1.4 Research Methodology

This thesis employs doctrinal legal research to identify all relevant statutes and legal resolutions pertaining self-determination. The research will be based on ‘black letter law’³⁷, as this thesis attempts to relate all possible meanings and identification of the meaning of people in all relevant legal texts throughout the evolution of the principle of self-determination. This study combines doctrinal legal research with qualitative socio-legal analysis to contextualize the case study within contemporary and realistic situations as per Cassese’s observation:

I believe that it is misleading to consider international law as a piece of reality cut off from its historical, political, and ideological context. To grasp

³⁷ Paul Chynoweth, *Legal Research*, 1 ADVANCED RESEARCH METHODS IN THE BUILT ENVIRONMENT 1, 29 (2008). As Chynoweth explains, “These are systematic formulations of the law in particular contexts. They clarify ambiguities within rules, place them in a logical and coherent structure and describe their relationship to other rules.”

international law in all its ramifications, one ought to look at it as a set of continuously changing elements of a whole.³⁸

Therefore, as Chynoweth explains, this thesis should clarify the meaning of people when “an uncertain or ambiguous legal ruling can often be more easily interpreted when viewed in its proper historical or social context.”³⁹ As for the legal criteria of the case study, this thesis supports the argument with data gathered through semi-structured interviews with seven participants. Specific interview conducted with an academia, Assoc. Prof. Dr. Haniff Ahamat from National University of Malaysia, specializing in Thailand-Malaysia border history, with a particular focus on Patani’s historical border demarcation. The interview questions also posed to the representative of civil society leaders such as Asmaae from CCST, Aladee from CSAP and Yamadibu from Yayasan Bunga Raya. Direct opinions also procured from the former spokesperson of one of the dominant liberation fighters’ organizations in Patani, BRN, Mr. Hasan Taib. It is important to conduct interviews from NGO’s, beside academia and liberation fighters in order to formulate a holistic view on the situation faced by Patani people.

The discussion of the thesis will proceed as follows. Chapter Two examines the historical development of the self-determination principle from the perspectives of President Woodrow Wilson (USA) and President Vladmir Lenin (USSR), as well as its inclusion in the United Nations Charter. The chapter also examines how this principle has evolved through UN Resolutions, Covenants, and judicial decisions. Chapter Three discusses the definition of people within the framework of the right to self-determination and the ongoing contentions related to this group of people. Chapter Four applies the above framework to the Patani people, examining the status of Patani people and their claims against Thailand as a colonial power, as well as current analyses on the right to self-determination of the Patani people.

1.4 Limitation

This thesis confines the discussion of self-determination to only the definition of people, specifically people in the post-colonial era from a legal viewpoint. However, it

³⁸ ANTONIO CASSESE, INTERNATIONAL LAW, Preface (2005).

³⁹ Chynoweth, *supra* note 36 at p. 30.

does not delve into whether the people of Patani aspire to pursue their right to self-determination, nor does it examine the kind of autonomy and the extent of its authority that the right of self-determination could provide. This study also does not extend its discussion of the right to self-determination with other principles of international law, such as *uti possidetis juris* and its possible remedy in relation to Constitutional Law and the Constitution of Thailand.

1.5 Conclusion

With the evolution of international law, where sovereign states are equal before the law, human rights have also evolved to encompass political, economic and social aspects. This thesis attempts to enrich the understanding of the concept of “peoples” under international law by recognizing the diversity and rights of different cultures, ideas and traditions of people worldwide. It is hoped that states will be reminded of their obligations toward their citizens, majority and minority include

Chapter 2:

**HISTORICAL DEVELOPMENT OF RIGHT TO SELF-
DETERMINATION**

2.1 Introduction

This section provides a historical background of the development of the right to self-determination. I will explain the incorporation of the principle into the UN Charter tracing its evolution from a principle to a properly recognized right. I will also investigate the important resolutions passed by the General Assembly and the pertaining scholarly interpretations. Finally, I will analyse the judgments of the International Court of Justice on the matter.

2.2 Wilson & Lenin's Concept of Self-Determination

Woodrow Wilson, called the “father of the principle of self-determination”, is the 28th U. S. President. During his time, colonial power only concerned itself with the principal self-determination in terms of legitimacy, rule and negotiation with the colonised peoples and the defeated empires. On the other hand, Lenin was using self-determination as an idea for working-class struggles, indirectly contributing to the principle. Lenin claims that the concept of self-determination as the proponent of ‘freedom of liberation’ from colonial power could be invoked by an ethnic or national group of the oppressed. While both concepts share the same idea, they differ in their approach.

2.2.1 The Bolshevik Revolution

Although it was not explicitly mentioned, the American Declaration and French Revolutions had imbued the sense of nationalism as a political thought. None of them expressly referred to the phrase ‘self-determination’.⁴⁰ Karl Marx was the proponent of its first usage, borrowing from Hegel’s theological discussion and bringing the concept

⁴⁰ Uriel Abulof, *The Emergence and Evolution of Self-Determination*, in THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION 16, 22 (1 ed. 2023)

into the political spotlight. Marx transformed the principle of self-determination from moral and theological discussion into a political idea in his 1865 Proclamation on the Polish Question.⁴¹ Abulof observes that the Communist Revolution in 1848 “marked the nationalization of political self-determination”. One example is from the *Publication of Manifesto to the European Peoples* in 1848 in Prague where the Bolsheviks promised “equal rights to all nations”.⁴²

This version of Bolshevik’s self-determination is a collective right by nature, granting people the right to have a proper state in which they themselves constitute the majority.⁴³ This Manifesto was supported by Lenin in 1903 in Article 9 which states that the “right of self-determination for all nations included within the bounds of state.”⁴⁴ Notably, the Bolshevik’s concept of self-determination was even afforded to the people within a state. Lenin saw its appeal, took advantage in promoting the principle, and internationalized the appeal of socialism to the world.⁴⁵ In Lenin’s words, “We say: In order that we may have the strength to accomplish the socialist revolution and overthrow the bourgeoisie, the workers must unite more closely, and this close union is promoted by the struggle of self-determination.”⁴⁶

While this appeal was anti-nationalist, as Spark observed,⁴⁷ it is not necessarily so. Lenin proclaimed that there is an obligation to deny colonialism in any form it materializes, including ‘salt-water’ colonialism. Lenin emphasized that the right to self-determination means the right to exist as a separate state and should not be limited to regional autonomy.⁴⁸ The Bolshevik Declaration of the Rights of the People of Russia emphasized that self-determination includes the right to separate and form an independent

⁴¹ WALKER F. CONNOR, *THE ETHNIC DILEMMA IN MARXIST-LENINIST DOCTRINE*, 132 *WORLD AFFAIRS* 5 (1969).

⁴² *Id* at p. 22, para 1.

⁴³ See JÖRG FISCH, *THE RIGHT OF SELF-DETERMINATION OF PEOPLES: THE DOMESTICATION OF AN ILLUSION* 1, 119 (Anita Mage tran., 2015),

⁴⁴ Pearce, Party Programme, 6 in *Id* at p. 119.

⁴⁵ Uriel Abulof, *The Emergence and Evolution of Self-Determination*, in *THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION* 16, 1 ed. (2023).

⁴⁶ Vladimir Illich Lenin, *The Discussion on Self-Determination Summed Up*, 22 *COLLECTED WORKS* 320 (1916).

⁴⁷ SPARKS, *supra* note 3 at p. 91.

⁴⁸ Abulof, *supra* note 40 at 23.

state.⁴⁹ Lenin denounces ‘land-imperialism’ in a bid to compete with Western-European nationalism. By promoting the message of ‘equality for all people’, self-determination also includes the right to claim secession if they wish to do so. This is done to achieve Lenin’s idea of equal rights among nations to determine their destiny.⁵⁰

As Abulof observed, Finland proclaimed independence as a consequence of the Bolshevik Declaration and Lenin’s idea. Ukraine, an autonomous region under the USSR, also requested to be awarded the full right to self-determination in the event of the 1918 German-Russian peace negotiation at Brest-Litovsk.⁵¹ There are three components in the principle of self-determination.⁵² First, it can be invoked by any ethnic or national group, not limited to colonial people. Second, in the event of the dissolution of military conflicts, the principle must be observed. Third, the principle is anti-colonial, and the penultimate aim is total liberation from colonial power.

2.2.2 Wilson Post-World War I Order

President Woodrow Wilson is one of the most fascinating and complex figures in US political history. According to Sparks, Wilson was a political philosopher who wrote multiple works of political theory. He remains the only US president to acquire a PhD, and his theoretical beliefs certainly impacted his conduct during his presidential term. His perspective on the essence of the state and the source of its power stood out among them.⁵³ Wilson believes that reverence towards authority is inherent to human nature. Therefore, authority rather than consensus should serve as the foundation of the modern state. However, this governmental authority is dependent upon the customs of every nation.⁵⁴ Beginning with his opinion that a racially homogeneous society is required as the foundation for statehood, it is apparent that he is committed to a (managed) type of decolonisation.⁵⁵

⁴⁹ J.H RICHARD, *THE NATION* 817 (1918) cited in *id* at 23.

⁵⁰ Vladimir Il’ich Lenin, *The Right of Nations to Self-Determination*, 395, 453-454 (1961) cited in *id* at p. 91.

⁵¹ Abulof, *supra* note 40 at 23-24.

⁵² CASSESE, *supra* note 10 at p. 16.

⁵³ SPARKS, *supra* note 33 at p. 93.

⁵⁴ Richard W Van Alstyne, *Woodrow Wilson and the Idea of the Nation State*, INTERNATIONAL AFFAIRS (ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS 1944-) 293 (1961).

⁵⁵ SPARKS, *supra* note 33 at p. 94.

This notion of political self-determination could be described as follows: By recognizing its shared identity, traditions, and culture, the people can establish themselves as a nation-state. Building on Raic's observation, Klabbers⁵⁶ notes that a new concept in international law was established with the publication of Wilson's Fourteen Points.⁵⁷ Wilson had outlined a plan for peace in Europe, hoping to persuade the major nations to agree to a negotiated cease-fire.⁵⁸ The cornerstone of that idea is a stable Europe, founded upon the notion of political self-determination.⁵⁹ Wilson's idea can be demonstrated in his speech: "No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."⁶⁰

In his analysis, Sparks claimed that the above passage is ambiguous. The question arises whether Wilson was advocating a solid right to national (nation-) statehood, the notion of popular consent to government, or whether his goal was to stop Bolshevik Russia, or to prevent the European powers from gaining territory due to the war.⁶¹ Nonetheless, the intention could be discerned from Spark's observation. Wilson believed in "the superiority of the rights of 'peoples' over the rights of Governments. The intention was clear in his letter to Pope Benedict XV, and it says the people have the right to decide what kind of government it ought to be."⁶²

Wilson's "Fourteen Points" address in January 1918 was fundamental for the Allied Powers to utilize these principles for post-war Europe.⁶³ In order to redraw Europe's borders after World War I, it was clear that solutions—or at the very least, guidelines—had to be developed. According to Abulof, there is no direct reference to 'self-determination' in Wilson's Fourteen Points speech. On the other hand, Raic opined that

⁵⁶ DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 177 (2002).

⁵⁷ Klabbers, *supra* note 1 at 187.

⁵⁸ SPARKS, *supra* note 3. P. 95

⁵⁹ *Id.* P. 95

⁶⁰ W WILSON, 'PEACE WITHOUT VICTORY' (22 JANUARY 1917)

⁶¹ SPARKS, *supra* note 33 at p. 96.

⁶² President Wilson's reply to the Pope's Letter, August 28, 1917.

⁶³ RAIC, *supra* note 55 at 180.

even though it was not explicit in the Fourteen Points speech, six of them impliedly referred to it in some cases.⁶⁴ For example, Point V calls for all claims made by governments or peoples to be judged with “a free, open-minded, and absolutely impartial adjustment” to ensure that rulings can be made equitably. Point IX provides guidance for the reconstruction of post-War Europe, such as the realignment of Italy’s borders. Point XI accorded autonomy to Romania, Serbia and Montenegro in accordance with the principle. Point X issues autonomy for the people in the Austria-Hungary Kingdom. Point XII touches explicitly upon the restriction of the Ottoman Empire to regions with only Turkish presence.⁶⁵

After the Fourteen Points speech, Wilson gave another on February 11, 1918, about ‘self-determination’. In his Four Principles statement, Wilson specified that⁶⁶ “National aspiration must be respected; peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of actions which statesmen will henceforth ignore at their peril.” The Four Points can be summarized as follows: (i) justice must be acted upon accordingly to attain permanent peace, (ii) People and territory are interconnected and thus cannot be made sacrificial pawns by the states, (iii) Settlement of territory disputes must be in the interest of the population, (iv) Even though the national objective is the aim, it must not create animosity and hatred in the future.⁶⁷

2.2.3 Influence of Wilson and Lenin Forward

Lenin influenced Wilson’s principles and ideas in developing the concept of self-determination. According to Sparks, Wilson was also driven to keep up with Lenin’s achievements by his ambition to establish the United States as a dominant world power after the war.⁶⁸ Wilson believes that peace can be attained when people are empowered to decide their government through democratic means. While Lenin’s idea is closer to the

⁶⁴ *Id* at p. 181.

⁶⁵ *Id.* at p. 181 citing Thomas A. Bailey, *Woodrow Wilson and the Lost Peace* (1944) at p. 333-334.

⁶⁶ Uriel Abulof, *The Emergence and Evolution of Self-Determination*, in *THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION* 16, 24 (1 ed. 2023)

⁶⁷ RAIC, *supra* note 55 at p. 182 citing Bailey, *supra* note 64 at p. 335.

⁶⁸ SPARKS, *supra* note 33 at p. 96.

original understanding of Marxist theory, Russia was even more zealous about adopting it, imbuing it as part of the class struggle, thereby increasing the appeal of communism.⁶⁹

There were significant disparities in the two leaders' views on self-determination. Wilson's idea was a nationalist, bottom-up strategy in introducing internal political independence that could elevate the (ethno-nationalistically defined) people above any type of government institution. On the other hand, it can be observed that Lenin's anti-nationalist idealism is akin to top-bottom strategy in breaking down the foundations of foreign authority towards colonized people. Therefore, both agreed that colonialism is inherently unacceptable. Thus, people who have been colonized should be accorded the autonomy of self-government.

Both leaders have contributed immensely to the development of self-determination post-World War I. As Van Alstyne remarks, Wilson and Lenin have raised the principle of self-determination to an elevated status in international law, making them the 'twin prophets of the new international order'.⁷⁰ In the following two decades, Cass observed the incorporation of the principle in the Soviet Constitution⁷¹ and most importantly, its inclusion in Article 1 of the United Nations Charter.⁷²

2.3 Self-Determination in The UN Charter

Self-determination was a political principle that allowed separate people who spoke the same language to unite to create a new polity. Nonetheless, this principle would only apply if given a mandate by the victorious state in World War I. As Hannum observed, colonized states such as Ireland were not given opportunities to become a new state. More often, this principle applies only exclusively to the European region.⁷³ The

⁶⁹ *Id.*: Lenin, *supra* note 45.

⁷⁰ Van Alstyne, *supra* note 49 at p. 307.

⁷¹ Cass, *supra* note 16 at p. 25. Article 29 of the Constitution of the Union of Soviet Socialist Republics, adopted in

1917, stated that the USSR's relations with other states were based on, inter alia, "the equal rights of peoples and their right to decide their own destiny."

⁷² U.N. Charter Art 1.

⁷³ Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773 (1998) at p. 774.

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first phase also serves as a guide to dividing people into states in the Austro-Hungarian and Ottoman Empires, the losing parties in World War I.

The adoption of the United Nations Charter (hereinafter 'UN Charter') in 1945 signaled the start of the second phase of the evolution of the concept of self-determination. To differentiate the changing of the phase, member states of the United Nations are now willing to recognize self-determination as a principle. This time, it can be construed as 'a reaffirmation of the sovereign equality of states', although Hannum argues that it does not limit the principle of self-determination to it.⁷⁴

Post World War II, the United Nations was committed to upholding the rule of law as emboldened in the UN Charter. Sparks argued the importance of the UN Charter in shaping the modern international law structure, citing Tomuschat's observation. It is undeniable that the United Nations and its organization contributed immensely⁷⁵ This is further strengthened by Sparks, who support the opinion that the UN Charter has become the world community's constitution.⁷⁶

How does the principle of self-determination transform? Initially, the United States was reluctant to affirm the idea of self-determination in a binding treaty, realizing its difficulties in implementing its implication in the future.⁷⁷ According to Kirgis, although the principle of self-determination was only deemed to be associated with the idea of President Woodrow Wilson, it has become a principle of positive international law, accepted by most of the states at the behest of the Soviet Union at the San Francisco Conference on the United Nations.⁷⁸

The UN Charter's purposes and principles refer directly to the principle of self-determination in Article 1, Paragraph 2. It became the foundation of the establishment of the United Nations and its guiding principles after the two World Wars. The inclusion of

⁷⁴ *Id* at p. 775.

⁷⁵ SPARKS, *supra* note 33 at p. 107 citing CHRISTIAN TOMUSCHAT, *THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* (1995).

⁷⁶ SPARKS, *supra* note 3.P. 107

⁷⁷ Frederic L Kirgis, *The Degrees of Self-Determination in the United Nations Era*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 304 (1994); citing Ruth B Russell, *A History of the United Nations Charter: The Role of the United States 1940-1945*, 811 (1958).

⁷⁸ Russell, *supra* note 77 at p. 810-811, cited in Kirgis, *supra* note 77 at p. 304.

the principle was intended to prevent past tragedies from occurring and embark on a new path to peace. Article 1 (2) reads: “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.”⁷⁹

Abe opined that Article 1(2) signifies the development of the political principle of self-determination into a moral code, reflecting the spirit of colonial people for their right to independence.⁸⁰ However, it does not clarify the concept of self-determination, the exact definition of ‘peoples’, or make a uniform understanding of self-determination.⁸¹ The *travaux préparatoires* of the Charter, as Cassese argued,⁸² did not mean any of these following: “(a) the right of a minority or an ethnic or national group to secede from a sovereign country (b) the right of a colonial people to achieve political independence...(c) the right of the people of a sovereign State freely to choose its rulers through democratic and free elections⁸³.”

Further discussions were debated on whether there is a linkage between ‘nations’ and ‘peoples’ in Article 1 (2). As Anderson argues, there is a correlation in Article 1(2) between the words “nations”, “equal rights,” and “self-determination of peoples”. It is plausible that “nations” and “peoples” are not identical and instead overlap in specific instances. However, dismissing the idea that “nation” does not include “people” as part of its meaning is incorrect.⁸⁴

From another perspective, based on a literal interpretation of the clause, it shows that the phrase “peoples” did not relate to people living in colonies or other areas that were not UN member states at the time but rather exclusively to the UN's member states.⁸⁵ One opinion was made by Rodriguez-Santiago, who used a literal textual interpretation on the

⁷⁹ U.N. Charter, *supra* note 72. Art. 1 (2)

⁸⁰ Ai Abe, *An Outstanding Claim: The Ryukyu/Okinawa Peoples’ Right to Self-Determination under International Human Rights Law*, 13 ASIANJIL 22, 24 (2023) refer to CASSESE, *supra* note 10 at p. 43.

⁸¹ Abe, *supra* note 74 at p. 24.

⁸² CASSESE, *supra* note 10 at p. 42.

⁸³ Abe, *supra* note 74 at p. 24.

⁸⁴ Glen Anderson, *Who Are the “Peoples” Entitled to the Right of Self-Determination?* THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION 41, 42 (2023).

⁸⁵ Elizabeth Rodriguez-Santiago, *The Evolution of Self-Determination of Peoples in International Law*, THE THEORY OF SELF-DETERMINATION (2016); as cited in Abe, *supra* note 74 at p. 24.

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French version of the chapter “leur droit à disposer d’eux-mêmes” which translates as “their right to self-determination”. In this translation, “the possessive adjective ‘their’ designates the same peoples for which the part of the sentence had proclaimed the principle of equal rights, that is to the members of UN.”⁸⁶ Cassese, further opined that Article 1(2) proposed that the UN member states are only encouraged to grant “self-government” to the communities over which they possess control as much as necessary.⁸⁷

There is also the question of whether Article 1 (2) establishes any obligations for UN members to act upon the principle. Sparks agrees with Hanks Kelsen which rebutting the argument of Antonio Cassese that it does not.⁸⁸ In contrast, Sparks proposes a counterargument to rebut Hans Kelsen’s statement that self-determination does put an obligation on its members from the UN Charter and its duties through the linkage of Articles 1 & 2 of the UN Charter.⁸⁹

Drawing from Kelsen’s observation, Sparks argues that Article 1 acts as a mirror that reflects the principle of self-determination in Article 2 (1) regarding the equal status of people as follows: “The Organization is based on the principle of the sovereign equality of all its Members”. It is also reflected in Article 2 (4) on the prohibition of intervention as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

In other words, self-determination is a “guarantee of the equality of Member States,” and at the same time, prohibits other Member States from intervening in the internal affairs of others. As Sparks elaborates, Article 1 (2) reflected the principle that the United Nations must abide by to ensure the equality of peoples (and consequently, the equality of polities) in Article 2 (1), and also restriction of states from interfering in other’s affairs in Article 2 (4).⁹⁰ The principle of self-determination in its political form guarantees a choice in the type of governance, an option exclusively reserved for the specific

⁸⁶ Rodriguez-Santiago, *supra* note 79 at p. 218.

⁸⁷ CASSESE, *supra* note 10 as cited in Abe, *supra* note 74 at p. 24.

⁸⁸ SPARKS, *supra* note 33 at p. 108.

⁸⁹ *Id* at p. 110. citing H. Kelsen, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS 15 (1951).

⁹⁰ SPARKS, *supra* note 33 at p. 110.

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population as a whole.⁹¹ It also affirms that certain groups of people's interests may not be deemed superior to others'. For example, to a certain extent, it can determine how another country will be governed.⁹² According to Sparks, this duality meets Kelsen's criteria of a 'true legal right', "a corresponding duty, and a potential remedy".⁹³

Another relevant article is Article 55 in Chapter IX concerning International Economic and Social Cooperation. The UN Charter obliges its members to guarantee self-determination to achieve peace. The article reads thus: "Conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the equal rights and self-determination of peoples."⁹⁴ According to Anderson, for the UN Charter to be consistent, the application of the terms 'peoples' and 'nations' must be synonymized. Anderson explains that the State possesses more than one nationality; therefore, "more than one people can exist within a State."⁹⁵ The preparation of the UN Charter's documents also suggests an expansive scope of the term 'people'. Therefore, the term 'nation' does comprise multiple political entities. The United Nations Conference on International Organization (UNCIO) explains:

[T]he word "nation" is used only seven times in the Technical Committee text for the most part in a broad and non-political sense, viz., "friendly relations among nations". In this non-political usage, "nation" would seem preferable to "state" since the word "nation" is broad and general enough to include colonies, mandates, protectorates, and quasi-states as well as states. It also has a poetical flavor that is lacking in the word "state."⁹⁶

Therefore, preparatory documents of the UN Charter in which the term "people" also includes those living in the Eastern European area, are designated as people in the "non-self-governing states," as Anderson observed. This can be demonstrated from the UNCIO documents: "Concerning the principle of self-determination, it was strongly emphasized

⁹¹ *Id.*

⁹² *Id.* at p. 110.

⁹³ *Id.* at p. 110 citing Kelsen, *supra* note 91 at p. 29.

⁹⁴ U.N. Charter Art. 55, *supra* note 66.

⁹⁵ Anderson, *supra* note 84 at p. 34.

⁹⁶ Documents of the United Nations Conference on International Organization, San Francisco, Volume XVIII, 657, 1945.

on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter.”⁹⁷

From the arguments above, Article 1 (2) extends its meaning beyond the political entities mentioned by Rodriguez and Cassese. Quane further argues that the drafters of the UN Charter dismissed the claims that Article 1 only applies exclusively to the UN Member States.⁹⁸ Most scholars, such as Radan, Franck, Cristescu, Quane and Ofuatey-Kodjoe, have arrived at the same understanding.⁹⁹ Therefore, Paragraph 2 intended to proclaim the equal rights of peoples. Consequently, their right to self-determination, which conforms with the equality of rights, extends to states, nations, and peoples.

Sparks argues there are similarities in the application of the term ‘peoples’ in Articles 55 and 1 in terms of language and obligation. Therefore, the implications must be of similar magnitude. The UN Member States should respect and uphold Self-determination as a principle, albeit limited application. Prior to its inclusion in the UN Charter, the principle ought to be discussed and limited in moral and political settings, as Sparks observed.¹⁰⁰ However, after its inclusion, Hannum argues¹⁰¹ that it contributes significantly to the United Nations' further development of international law, especially in the principle of self-determination. Twenty years later, the Charter's proclamation of self-determination will later transform towards the recognition of a right to self-determination.

2.4 UN Resolutions 1514, 1541 & 2625

2.4.1 Declaration on The Granting of Independence to Colonial Countries and Peoples 1960 (Resolution 1514)

⁹⁷ Documents of the United Nations Conference on International Organization, San Francisco, Volume VI, 296 1945.

⁹⁸ Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 537 (1998) as cited in Anderson, *supra* note 78 at p. 43.

⁹⁹ PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* (2004); Thomas M Franck, *Legitimacy in the International System*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 705 (1988); Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, (NO TITLE) (1981); OSCAR SCHACHTER & CHRISTOPHER C JOYNER, UNITED NATIONS LEGAL ORDER (1995); Anderson, *supra* note 84 at p. 44.

¹⁰⁰ SPARKS, *supra* note 3 at p. 111.

¹⁰¹ Hannum, *supra* note 73 at p. 775.

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In 1955, representatives from Third World Countries held a conference in Bandung, denouncing colonialism and demanding independence from colonial masters.¹⁰² In 1955, 16 states applied for and granted the UN Membership. In 1960, 19 states were admitted, establishing a non-aligned bloc, Group 77, Bandoeng group, and developing or third-world countries. This bloc ensures that Resolution 1514 (XV) was passed with strong advocacy towards decolonization.¹⁰³

The General Assembly's Declaration on The Granting Of Independence To Colonial Countries and Peoples',¹⁰⁴ also known as Resolution 1514 (XV) (hereinafter Resolution 1514), marked the second part of the second phase of the evolution of the principle of self-determination.¹⁰⁵ Resolution 1514, at this stage, confined itself to the colonial people to liberate themselves from colonial powers. Self-determination became synonymous with decolonization from now on, in the preamble as follows: "... the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations". As Hannum argues, to claim the right of self-determination in this phase, Resolution 1514 does not oblige the requirement of "ethnicity, language or culture".¹⁰⁶ This is demonstrated by the preamble of Resolution 1514: "respect for the principles of equal rights and self-determination of all peoples... for all without distinction as to race, sex, language or religion."

According to Abe,¹⁰⁷ the self-determination principles in this stage, started to be associated with racial discrimination and all manifestations of colonial forms. Cass supported this argument, beginning in Resolution 1514, evidence of *opinio juris* had signaled a confidence that self-determination has become customary in nature in the international community.¹⁰⁸ A UN Special Rapporteur study by Cristescu stated that this document officially demonstrated the evolvement of the principle of self-determination,

¹⁰² CASSESE, *supra* note 10 at p. 44.

¹⁰³ EDWARD MCWHINNEY, *United Nations Audiovisual Library of International Law DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES*, at 1, https://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf.

¹⁰⁴ UN General Assembly Resolution 1514 (XV), (1960).

¹⁰⁵ SPARKS, *supra* note 33 at p.120.

¹⁰⁶ Hannum, *supra* note 73.

¹⁰⁷ Abe, *supra* note 80.

¹⁰⁸ Cass, *supra* note 16 at p. 28.

and Senaratne supported this towards a systematic codification process¹⁰⁹. The General Assembly has reached a stage of maturity where it can formalize its intention to develop a principle into a right, thereby expanding the law of self-determination under the authority of UN Charter.¹¹⁰

Further analysis of the preambles declaration of Resolution 1514 is as follows: "... based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion."¹¹¹ This preamble demonstrates the first instance in which self-determination was linked with human rights in written documents at the highest level of international meetings. Resolution 1514 was adopted with eighty-nine votes in favor and nine abstentions, showing overwhelming support for the General Assembly.

Resolution 1514 in Paragraph 1 states that: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, in contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."¹¹² Cristescu in his specialized UN study on Resolution 1514 believes that domination in any form is prohibited from this point onward. Independence that ought to be granted, must be fulfilled in all aspect of political, economic and cultural dimensions.¹¹³ For example, independence must not be forced; instead, the people have the right to favor the type of government they desire and live freely with their own cultural traditions and way of life.¹¹⁴ In this sense, who are the people in the dominating position? According to Kirgis, domination comes from other racial groups.¹¹⁵ I concur with this position as it aligns with the definition of self, which identifies itself as different from the other, based on the earlier discussion of the philosophical background of self-determination.

¹⁰⁹ KALANA SENARATNE, *INTERNAL SELF-DETERMINATION IN INTERNATIONAL LAW: HISTORY, THEORY, AND PRACTICE* 1, 36 (2021)

¹¹⁰ Cristescu, *supra* note 92 at para 39 as cited in SPARKS, *supra* note 33 at p. 120.

¹¹¹ UN General Assembly Resolution 1514 (XV), *supra* note 95 at the 2nd preamble.

¹¹² *Id* at para 1.

¹¹³ Cristescu, *supra* note 92 at p.7.

¹¹⁴ *Id* at p. 7.

¹¹⁵ Rupert Emerson, *Self-Determination*, 65 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 459 (1971) as cited in Kirgis, *supra* note 71 at p. 305.

Further examining Resolution 1514, the right of self-determination can be applied to the “dependent people” available in the preamble. It lays down the definition of ‘dependent peoples’ as those who are in pursuit of independence.¹¹⁶ According to Spark, although the right of self-determination has been established in Resolution 1541, there is a caveat on its application. At the time of its formulation, it could not be claimed outside the colonial situation. Furthermore, the declaration expressly states that its practicality in other circumstances is not considered: “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.”¹¹⁷

As Senaratne commented and agreed upon by Abe, Resolution 1514 has given, a ‘narrow definition’ of the term “non-self-governing peoples” in the preambles and Paragraph 5 regarding self-determination.¹¹⁸ As a result, Senaratne claims that the demands made by various ethnic and linguistic minor groups in the postcolonial states were left unheard.¹¹⁹ To substantiate an argument to this claim, it could be caused by the narrow definition presented by modern scholars on the concept of colonialism. As per the comment made by Professor Edward McWhinney, it has been observed from the lobbying session and intention of the drafters of Resolution 1514, that it does not intend to go beyond the definition of “salt-water” colonialism, which we will later discuss.¹²⁰

2.4.2 Principle Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e Of The Charter (Resolution 1541)

While Resolution 1514 has solidified the status of self-determination into a right, this still leaves several questions unanswered. The day after Resolution 1514 was adopted, the General Assembly consequently adopted the Principle Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called

¹¹⁶ UN General Assembly Resolution 1514 (XV), *supra* note 104.

¹¹⁷ *Id* at Para 6.

¹¹⁸ SENARATNE, *supra* note 100 as cited in Abe, *supra* note 74 at p. 25.

¹¹⁹ SENARATNE, *supra* note 100 at p. 37.

¹²⁰ MCWHINNEY, *supra* note 98 at 2.

for Under Article 73e Of the Charter (hereinafter Resolution 1541) as a guiding principle according to Article 73e of the Charter for the implementation of the right of self-determination. The question arises “that is whether or not, a territory is non-self-governing.”¹²¹ Principle 1 in Resolution 1541 states, “An obligation exists to transmit information under Article 73e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.”¹²²

According to Principle I, it is upon the UN Member States to inform which territories have not yet gained independence. The obligation is further emphasized in Principle II: “The obligation to transmit information under Article 73e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.”¹²³

However, a problem arises as previously discussed by Senaratne and Abe, in that McWhinney confirms the narrow definition of colonial territories and its people from the intention of the drafters of Resolution 1541. Principle IV further confirms this suspicion: “*Prima facie*, there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.”¹²⁴ According to Mustafa, the United States and Great Britain insisted that this principle be included; however, the Afro-Asian members of the Special Committee were on the opposition stance.¹²⁵

According to Abe, the phrase “graphically separate” had been restricted to “Blue Water Principle”. This principle defined non-self-governing people as “colonial peoples” and limited colonial people to the territorial borders of which their masters colonized before independence.¹²⁶ There was an attempt by Belgium to include indigenous peoples and minorities under the definition of “non-self-governing people” to claim such rights. Belgium granted Congo the

¹²¹ HANNUM, *supra* note 8.

¹²² G.A. Res. 1541 (XV), U.N. Doc A/RES/1541 (Dec. 15, 1960).

¹²³ *Id*, Principle II.

¹²⁴ *Id* at Principle IV.

¹²⁵ Zubeida Mustafa, *The Principle of Self-Determination in International Law*, 5 486 (1971).

¹²⁶ Abe, *supra* note 7 at p. 26.

right to self-determination. According to Belgium, colonialism would find its way into other forms in the future, as indigenous people would be subjected to a government without its free will.¹²⁷

2.4.3 Declaration on Friendly Relations and Co-Operation Among States (Resolution 2625)

The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (hereinafter Resolution 2625), in concordance with the UN Charter, was adopted in 1970. Sparks argues that the legal status of self-determination was strengthened by the practice of adoption of this resolution by a majority of the states. To further support Sparks' argument, the International Court of Justice (ICJ) declared the Declaration to be customary international law in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,¹²⁸ (hereinafter Nicaragua). It is no longer a mere repetition of the previous resolution; it has become customary under international law.¹²⁹ The Court supports this premise in the Nicaragua case and applied it in its advisory opinion on Kosovo's case.¹³⁰ The ICJ's approach indicates that the right to self-determination is a part of customary international law and is binding on all states.

Before the adoption of Resolution 2625, during the drafter's meeting in 1967, a proposal came from the Burmese delegation comprising military junta who had orchestrated a coup d'état in 1962, to take control of the government. They firmly intended to confine the principle of self-determination to the scope of colonialism, and any independence must be mandatorily based upon the reason of colonial domination. Laoutides commented that some opposed this view. Hence, deliberation on extending the scope of self-determination developed.¹³¹ According to Kirgis, the concept of self-

¹²⁷ WARD CHURCHILL, *ACTS OF REBELLION: THE WARD CHURCHILL READER* (2003) as cited in Abe, *supra* note 74 at p. 26.

¹²⁸ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J.14, 181 (June 27) (separate opinion of Judge Ago).

¹²⁹ SPARKS, *supra* note 3 at p. 124.

¹³⁰ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (2010) ICJ Reports 403, para 80.

¹³¹ Costas Laoutides, *Self-Determination and Decolonization*, in *THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION* 69 (1 ed. 2023).

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determination was no longer restricted by the colonialism criteria¹³², and this was supported by Sparks, who suggested this brought about a new idea, a polity-based self-determination¹³³ as shown in Resolution 2625 on the principle of equal rights and self-determination of peoples:

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.

Laoutides further observed that several academics and jurists such as Brownlie, Bucheit, Crawford and Musgrave proposed expanding this definition of people to include a state or region where the population was not adequately represented.¹³⁴ However, this extension was limited to internal self-determination at the end of the operative part. The caveat clause in Resolution 2625 is as follows:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would *dismember or impair, totally or in part, the territorial integrity or political unity* of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.¹³⁵

Senaratne commented on this clause that the right to self-determination disallows secession related to territorial integrity. However, such prohibition comes with the exception that the government does not represent the whole population. In other words, the government did not discriminate against any people in their state.¹³⁶ According to Kirgis, the caveat clause was later restated at the 1993 UN World Conference on Human

¹³² Kirgis, *supra* note 71 at p. 305.

¹³³ SPARKS, *supra* note 33 at page 125.

¹³⁴ Ian Brownlie, *An Essay in the History of the Principle of Self-Determination*, in *STUDIES IN THE HISTORY OF THE LAW OF NATIONS* 60, 601-602 (1970); Lee C Buchheit, *Secession: The Legitimacy of Self-Determination*, 81 (1978); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW*, 99-102 (2006); Thomas D Musgrave, *Self-Determination and National Minorities*, 62-90 (1997) as cited in Laoutides, *supra* note 120 at p. 69.

¹³⁵ G.A. Res. 2625 (XXV), UN. Doc. A/RES/2625 (Oct. 24, 1970) (emphasis added).

¹³⁶ SENARATNE, *supra* note 101 at p. 39.

Rights with a slight variation. The exemption is not only confined to race, creed, or colour as it must be “a Government representing the whole people belonging to the territory without distinction of *any kind*.”¹³⁷ To support his argument, Kirgis stated that “a strong showing of opinion juris may overcome a weak demonstration of state practice to establish a customary rule.”¹³⁸ Thus, these findings suggest that justifiable action against illegitimate power was tacitly acceptable by the UN. However, until the end of the Cold War, Bangladesh's independence was the only case for its application.¹³⁹

As Abe observes, Salmon believes that in the previous resolutions mentioned, including Resolution 2625, self-determination was only discussed in its external form.¹⁴⁰ Salmon, referred to his opinion based on the phrase in Resolution 2625, observes that “without external interference, their political status” from others¹⁴¹. However, Senarate argues that the internal form can be observed from the caveat clause “of a government representing the whole people”. Therefore, it is implied, an internal aspect of self-determination is evident in this Resolution 2625.

The government therefore must act in accordance with the wishes of its citizens.¹⁴² Finally, an internal form of self-determination, according to Sterio, also includes the type of government, autonomy rights, special region, integration, and other types of arrangements according to the people's will.¹⁴³

2.5 Formulation of Self-Determination in International Covenant on Civil (ICCPR) And Political Rights and International Covenant on Economic, Social and Cultural Rights (IESCR)

¹³⁷ Vienna Declaration and Programme of Action, pt. I, para. 2, UN Doc. A/CONF. 157/24 (pt. I) (1993), reprinted in 32 ILM 1661 (1993) (emphasis added) as cited in Kirgis, *supra* note 71 at p. 306.

¹³⁸ Frederic L Kirgis, *Custom on a Sliding Scale*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 146 (1987) as cited in Kirgis, *supra* note 71 at p. 306.

¹³⁹ CASSESE, *supra* note 10 at p.108-21; Hannum, *supra* note 67 at p. 35, 453; Otto Kimminich, A “Federal” Right of Self-Determination? in MODERN LAW OF SELF-DETERMINATION 83, 91-94 (1993); POMERANCE, *supra* note 27 at p. 39 as cited in Laoutides, *supra* note 120 at p. 306.

¹⁴⁰ Abe, *supra* note 74 at p. 28.

¹⁴¹ Jean Salmon, *Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?* in MODERN LAW OF SELF-DETERMINATION 253 (1993).

¹⁴² SENARATNE, *supra* note 101 at p. 39.

¹⁴³ MILENA STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: "SELFISTANS", SECESSION AND THE RULE OF THE GREAT POWERS (2013) as cited in Abe, *supra* note 74 at p. 28.

Following the Universal Declaration of Human Rights (hereinafter, UDHR), the International Covenant on Civil and Political Rights (hereinafter ICCPR) and International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) were adopted as legally binding human rights treaties. The covenants further clarify and define the UDHR's broad statements of principle, in addition to transferring the substance of the UDHR from the General Assembly's declaration to the level of treaty obligations. They further developed an institutional framework for the covenant's interpretation and oversight.¹⁴⁴ The solidifying of the status of the right to self-determination is supported by Cass, with the signing and adoption of two major Covenants (ICCPR & ICESCR) (hereinafter Covenants) on 16 December 1966. Cass¹⁴⁵ agreed with Pomerance¹⁴⁶, McCorquodale and other scholars¹⁴⁷ who asserted that self-determination has been ranked among the top essential rules of customary international law. According to McCorquodale,¹⁴⁸ scholars such as Brownlie, Cassese, Crawford and Espiell claim that it has achieved the status of *jus cogens*.¹⁴⁹ Referring to his UN report, Espiell considers self-determination to have the characteristics of *jus cogens*, which by itself is a product of natural law.¹⁵⁰

Nevertheless, the implementation and interpretation are still debatable among scholars of international law. Tsanava stated that in his observation of Article 1 in the Covenants, the principle of self-determination had been recognized as a “well-established universal human right”.¹⁵¹ As Burak and Dogan noted, in citing Wilson's work, the right of self-determination was ultimately inserted in both ICCPR and ICESCR. This can be observed from the Covenants, Article 1, which was present in the UN Charter as well as

¹⁴⁴ SPARKS, *supra* note 33 at p. 116.

¹⁴⁵ Cass, *supra* note 20 at p. 26.

¹⁴⁶ POMERANCE, *supra* note 27 at p. 1 as cited in Cass, *supra* note 16 at p. 26.

¹⁴⁷ McCorquodale, *supra* note 4 at p. 858.

¹⁴⁸ *Id.*

¹⁴⁹ I Brownlie, *The Rights of Peoples in Modern International Law. The Rights of Peoples. Ed. by J. Crawford* (1988); ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986); *THE RIGHTS OF PEOPLES*, (James Crawford ed., 1988); HECTOR GROS ESPIELL, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS* (1980).

¹⁵⁰ ESPIELL, *supra* note 149 at para 75-85, p. 13.

¹⁵¹ Tinatin Tsanava, *Do Minorities Have the Right to Self-Determination*, BUDAPEST, CENTRAL EUROPEAN UNIVERSITY 9, (2011).

in the previous UNGA Declarations:¹⁵² “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.”

Sparks argues that Article 1 of the Covenants were formulated to reaffirm the right of colonial people to self-determination, but the Covenants are not limited to colonial situations. He argues that the general provision in Article 1 refers to the general scope of peoples in Article 1. Later, this general provision was made specific and laid down for the non-self-governing territories and colonial people in Paragraph 3.¹⁵³ Anderson supports this argument, although it is still unclear who “all peoples” are. Nonetheless, Paragraph 1 implies that the intention here is to broaden the scope of people and its application.¹⁵⁴ The UN Human Rights Committee, commenting on the implementation of Article 1, asserts that states are obliged to make a report on “constitutional and political processes” in their own respective countries to the UN, to fulfill this obligation.¹⁵⁵

In analysing Article 1 (1) of the Covenants, Cassese examines the meaning and implications of the word ‘freely’, leading to further discussions on internal self-determination. While drafting the UN Covenant, two groups had opposing views. For the first group, internal self-determination meant the right to have a democratic government. The Western States proposed this following their failure to oppose the other party’s view.¹⁵⁶ The second group’s proposal which prevailed, viewed that internal self-determination meant the right to establish a government and to determine their own form of governance. This view was advocated by Pakistan, Lebanon and Egypt.¹⁵⁷ Egypt explained that ‘freely’ means the implementation of internal self-determination according

¹⁵² COP Burak & Eymirliolu Doğan, *The Right of Self-Determination in International Law Towards The 40th Anniversary of The Adoption of ICCPR And ICESR*, 10 JOURNAL OF INTERNATIONAL AFFAIRS 115, 120 (2018).

¹⁵³ SPARKS, *supra* note 33 at p. 118.

¹⁵⁴ Olga Šuković, *Principle of Equal Rights and Self-Determination of Peoples*, PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION, THE INSTITUTE OF INTERNATIONAL POLITICS AND ECONOMICS: BELGRADE 323 (1972) as cited in Anderson, *supra* note 78 at p. 44.

¹⁵⁵ UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984.

¹⁵⁶ UN Doc., A.C.3/SR.676, para 27 as cited in CASSESE, *supra* note 10 at p. 50.

¹⁵⁷ UN Doc., A.C.3/SR. 253, 13 (Pakistan); UN Doc., A.C.3/SR. 254, 9 (Lebanon); UN Doc., A.C.3/SR. 571, para 4 (Egypt).

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to the wishes of the people via elections, plebiscites, or other means.¹⁵⁸ India made a reservation to Article 1, arguing that self-determination applies only when the people are subjected to alien occupation or domination. Germany, France and Netherlands objected to India's reservation, yet India persisted in this view.

Based on his analysis of the preparation of the document, Cassese identified three situations under which the people could claim the right to self-determination. First is a whole population already living in a sovereign and independent state. Second, a whole population that has not yet gained independence. Third, a whole population in an occupied military state.¹⁵⁹ To fully oblige with Article 1 Paragraph 1, one must investigate the other parts of the Covenants.¹⁶⁰ Relevant articles pertaining to self-determination are: freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association (Article 22); the right to vote (Article 25b); and the right to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25a). Should there be violations by the State in any of the Articles mentioned, one could claim a breach of Article 1.¹⁶¹

Cassese argues that the right to self-determination in the Covenants is not absolute. Under Article 4 (1), there is a derogation clause as follows:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The provision provides an exception to the State to divert claims on self-determination according to Article 4(1). For example, in Article 25, there is no requirement for 'genuine periodic elections' where States could restrict people to choose

¹⁵⁸ UN Doc. A/C.3/SR571, para 4, 1954. as cited in CASSESE, *supra* note 10 at p. 60.

¹⁵⁹ CASSESE, *supra* note 10 at 59.

¹⁶⁰ CASSESE, *supra* note 10 at p. 53.

¹⁶¹ *Id.*

only several candidates from one party. Further, Article 21 (on the right of peaceful assembly) and Article 22 (on freedom of association), stipulate that States may impose restrictions to avoid complete fulfillment of internal self-determination.¹⁶²

Article 1(3) refers to the right of the people to freely decide their international status: “The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

Cassese argues that the provision is outdated, as all colonial people have achieved independence.¹⁶³ Article 1 (3) must be in harmony with the provisions of the Charter. Therefore, it must be read conjointly with Chapters 11 and 12 of the UN Charter. Even though there is no mention of self-determination, the Article in the Covenant has supplanted the obligation onto the UN Charter, thus giving weight to the States to oblige.¹⁶⁴

Anderson had a different opinion when commenting on Article 1 (3). The phrase “including” before mentioning this specific type of territory, implies the broader scope of self-determination. It goes beyond the colonial context to include people of minorities.¹⁶⁵ Furthermore, the UN Human Rights Committee, in its General Comment on Article 1, at point number 6, suggested this provision also applies to people who are disadvantaged or unable to exercise the right to self-determination. The Committee also obliged the State to facilitate this right in a positive manner.¹⁶⁶

This argument strengthens the fact that people do not necessarily equate with nations, per Anderson’s comment.¹⁶⁷ In the study on the preparation of the Covenants, as Šuković observed, the meaning of “peoples” also includes nations, which are “large compact

¹⁶² *Id* at p. 54.

¹⁶³ *Id* at p. 58.

¹⁶⁴ *Id.*

¹⁶⁵ Anderson, *supra* note 78 at p. 44.

¹⁶⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984, *supra* note 155.

¹⁶⁷ Anderson, *supra* note 78 at p. 45.

national groups” that possess ethnic, cultural, and historical identity in a specific border territory.¹⁶⁸ This opinion is supported by inference in Article 2 (1) of the ICCPR:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁶⁹

According to Anderson, the phrase “all individuals within its territory” in Article 2 when compared to the meaning of “people” in Article 1 does not mean the whole population of the state. If the connotation is intended to be the same, the phrase should read “to ensure the people within its territory” in Article 2. Radan argues that if “peoples” and “all individuals” are similar, then by logic, the phrase must be used consistently.¹⁷⁰ Further argument is supported by General Comment 12, the Human Rights Committee, which requires States to report on constitutional and political conditions of their States to evaluate the proper exercise of self-determination.¹⁷¹ In practice, Britain has recognized minorities such as Scots, Welsh and Irish as a distinct and separate group of peoples.¹⁷²

Article 27 of ICCPR is as follows: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” Cassese explains that this right accorded minorities the right to their own culture, language, and religion. According to Cassese in the Optional Protocol, these breaches, which only accept individual complaints, do not give rise to collective action. However, Anderson rebutted this argument by stating that Article 27 is a special clause designed to protect their

¹⁶⁸ Šuković, *supra* note 143 at p. 32 as cited in Anderson, *supra* note 78 at p. 45.

¹⁶⁹ International Covenant on Civil and Political Rights, *supra* note 27.

¹⁷⁰ “If, as Cassese argues, a people is in fact the entire population (‘all individuals’) of a state or colonial territory, then Article 2(1) should logically have referred to ‘its people’ rather than to ‘all individuals within its territory’. Whatever one makes of the strengths of this argument, it does not support the territorial concept of a people advocated by Cassese” at PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW*, 47 (2002) as cited in Anderson, *supra* note 78 at p. 45.

¹⁷¹ UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination), *The Right to Self-determination of Peoples*, 13 March 1984, *supra* note 155.

¹⁷² Anderson, *supra* note 84.

rights.¹⁷³ I concur with this argument, as Article 27 should provide a remedy at the individual level. When such rights are disputed at the state level, a minority individual could claim such rights at the Court.

Cassese further argues that Article 27 does not contain provisions related to political, economic and social rights. He argues that minorities do not equate the term “peoples” in Article 1 of the ICCPR. In his conclusion, the meaning of “peoples” must be limited to the “entire population of a State”.¹⁷⁴ In refute to Cassese’s argument, the term “peoples” in Article 1 has provided a broader interpretation to include any groups within a State, and sometimes coinciding with the term ‘minority’.¹⁷⁵ Thus, Article 27 is formulated to bestow special treatment upon the minorities to protect their identity as an extension of their original right to self-determination under Article 1 of the Covenants.

2.6 Judicial Cases

2.6.1 The Advisory Opinion on Western Sahara

In 1975, the ICJ issued its Advisory Opinion on the Western Sahara to answer a query from the General Assembly. Situated in northwest Africa, the Western Sahara (formerly known as the Spanish Sahara) spans 266,000 square kilometers. Its 1,200 kilometers of coastline run along the Atlantic Ocean, with Algeria to the northeast, Mauritania to the southeast, and Morocco to the north being its borders.¹⁷⁶ According to Burgis, due to Spanish colonization, the upper part of the region—roughly one-third of it is referred to as Saqiyyat al-Hamrā’, or the crimson canal in Arabic, and the lower two-thirds as Río de Oro, or the river of gold in Spanish. Apart from a small coastal strip, most of the terrain is extremely arid and receives very little rainfall annually, which encourages nomadic rather than pastoral living.¹⁷⁷

Burgis explained that the Islamic dynasties of the Alawites (1666-present), the Almohads (1145-1269), the Almoravids (1056-1147), the Idrisids (788-974), the

¹⁷³ *Id* at p. 46.

¹⁷⁴ CASSESE, *supra* note 10 at p. 61-62.

¹⁷⁵ Anderson, *supra* note 84.

¹⁷⁶ Sidi M. Omar, *The Right to Self-Determination and the Indigenous People of Western Sahara*, 21 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 41, 43 (2008).

¹⁷⁷ MICHELLE BURGIS, BOUNDARIES OF DISCOURSE IN THE INTERNATIONAL COURT OF JUSTICE: MAPPING ARGUMENTS IN ARAB TERRITORIAL DISPUTES 1, 194 (2009).

Merinids (1244-1465), and the Saadians (1554-1659) were among the empires that maintained and thrived by Western Sahara throughout history¹⁷⁸. The Arabs are Sunni Muslims, and their Hassaniyya dialect of Arabic reflects this. However, it is an oversimplification to classify them as Arabs, given that they are a diverse group of indigenous peoples. Due to its language and religion, it is prevalent to situate Western Sahara within the borders of the Arab World. Consequently, the Ṣaḥrāwīs might be thought of as African, Muslim, predominantly Arabo-Berber nomadic tribes with strong cultural ties to the neighboring Arab League nations of Morocco, Algeria, and Mauritania.¹⁷⁹

Between 1385 and 1884, there was some Spanish presence on the continent and surrounding area concerning fishing activities and trade around the Canary Islands.¹⁸⁰ France was the dominant power in the region after conquering Algeria and consolidating a partnership with the Spanish, British and Germans. Following the Berlin Conference in 1884, Spain established a protectorate over Rio de Oro, which it later solidified. Spain and France signed several treaties in 1900, 1904, and 1912, which outlined their respective interests in Northwest Africa.¹⁸¹ Omar stated the effects of such treaties – their territory was a colonial-drawn map that subsisted until today.¹⁸² From 1934 onward, Spain fully occupied the territory.¹⁸³

After Morocco's independence in 1956, a policy of 'Greater Morocco' was formed. Justification for the annexation of Algerian partial territories and Mauritania ensued based on this ideological understanding.¹⁸⁴ In 1973, Spain held an independence referendum for Western Sahara, taking active actions to develop governance with the locals.¹⁸⁵ Even

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at p. 195.

¹⁸⁰ See especially, Spain, Written Submission, International Court of Justice: Pleadings, Oral Arguments, Documents, Western Sahara, vol. I, at 73–425 as cited in *Id.*

¹⁸¹ *Id.* at p. 196.

¹⁸² Sidi M. Omar, *The Right to Self-Determination and the Indigenous People of Western Sahara*, 21 CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 41, 43 (2008).

¹⁸³ *Id.* at p. 195.

¹⁸⁴ *Id.*

¹⁸⁵ SPARKS, *supra* note 33 at p. 138.

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though Mauritania and Algeria agreed to the referendum, Morocco was adamant that the Western Sahara be reintegrated into its territories.¹⁸⁶

Morocco attempted to bring the case to the ICJ but was ultimately rejected by Spain.¹⁸⁷ As observed by Burgis and Sparks, Morocco, with other Arab nations, had invoked the General Assembly Resolution 3292 (XXIX)¹⁸⁸ in accordance with Resolution 1514 (XV)¹⁸⁹ to refer to the ICJ for an advisory opinion regarding Western Sahara.¹⁹⁰ Two questions were posed to the Court by the UNGA:

- 1) Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)?
- 2) If the answer to the first question is in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

The ICJ, in its Advisory Opinion, argues the following: In paragraph 77, the Court believes that the colonization period of Western Sahara by Spain began in 1884. This assertion is confirmed when a proclamation was made over the area. Under international law, occupation is one of the legal methods of acquisition by another country if it is ‘*terra nullius*’.¹⁹¹ The King of Spain had agreed with the local tribal chief to acquire Western Sahara. On the second question, under paragraph 107, the Court concluded that ‘effective and exclusive state activity’ was not strong enough to establish link of sovereignty between Kingdom of Morocco and Western Sahara.¹⁹² This is also similar to Mauritania in paragraph 149, whereby the Court believes that Mauritania, at that particular time of colonization, had been a different entity from “several emirates and tribes” that existed in Western Sahara.¹⁹³

¹⁸⁶ Thomas A Marks, *Spanish Sahara--Background to Conflict*, 75 AFRICAN AFFAIRS 3 (1976) as cited in SPARKS, *supra* note 33.

¹⁸⁷ ICJ Reps (1975) at para. 29 as cited in BURGIS, *supra* note 166 at p. 197.

¹⁸⁸ Question of Spanish Sahara, U.N GAOR (1974).

¹⁸⁹ G.A. Res. 1541 (XV), U.N. Doc A/RES/1541 (Dec. 15, 1960), *supra* note 122.

¹⁹⁰ *Id.* citing SPARKS, *supra* note 33 at p. 138.

¹⁹¹ Western Sahara, Advisory Opinion, (1975) ICJ Reports 12 at p. 39.

¹⁹² *Id.* at p. 49.

¹⁹³ *Id.* at p. 63.

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The relevant information for our discussion on self-determination in the case of Western Sahara demonstrates:

(a) that at the time of colonization, Western Sahara was inhabited by *peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them*; (b) that Spain did not proceed upon the basis that it was establishing its sovereignty over *terra nullius*: thus in his Order of 26 December 1884 the King of Spain proclaimed that he was taking the Rio de Oro under his protection on the basis of agreements entered into with the chiefs of local tribes.¹⁹⁴

Omar and Burgis also arrived at the same conclusion with regards to the first question posed by the Court. Prior to Spanish conquest, the Sahrawi were the indigenous people of Western Sahara¹⁹⁵, and the territory was certainly not *terra nullius* and was not a territory *sans maître* (without a ruler)¹⁹⁶. Hannum observed that ICJ's decision clearly emphasized the importance of the right to self-determination of the Indigenous people and that their wishes need to be consulted.¹⁹⁷ Although Hannum stated that the Court did not verify the principle of self-determination as binding in nature, it does affirm the right and its validity under international law.¹⁹⁸ On the second question, the legal claims made by Morocco and Mauritania, although valid, must not hinder the application of "free and genuine expression of the will of the peoples of the Territory"¹⁹⁹ under Resolution 1514.

Klabbers concluded from the Court's decision that oppression is unacceptable and the right to self-determination should be bestowed without the need to consult the indigenous people, such as in colonialism and apartheid²⁰⁰. Secondly, the Court did not refer to the 'right' but to the 'principle' of self-determination. Klabbers questions the Court's intention, arguing that the right to self-determination is an entitlement for those

¹⁹⁴ *Id* at para 81 at p. 31.

¹⁹⁵ Omar, *supra* note 165 at p. 44.

¹⁹⁶ BURGIS, *supra* note 166 at p. 201.

¹⁹⁷ HANNUM, *supra* note 5 at p. 38.

¹⁹⁸ *Id.*

¹⁹⁹ In August 1988 an agreement was reached between Morocco and Saharawi Polisario guerrillas for an UN-supervised referendum in Western Sahara. Sixty-eight states had recognized the Saharawi Republic as of early 1987, despite the fact that the Saharawi "government" has never exercised effective control within its claimed territory as cited in *Id* at p. 38.

²⁰⁰ Klabbers, *supra* note 1 at p. 194.

who want to claim, but not entirely absolute.²⁰¹ The example was, “One may be entitled to have loving parents, but surely one has no (legal) right to loving parents.”²⁰² However, Sparks argues that the Court is already firm in its findings that the right is absolute for colonized people to exercise self-determination. The Court cited the Namibia case, Resolution 1514, and Resolution 2625 while restating to the General Assembly to respect the wishes of the people of Western Sahara. As per Elizabeth Rodriguez-Santiago’s argument, the nature of such right is already undisputable under customary international law, namely, the right of people in non-self-governing territories.²⁰³

2.6.2 *The Kosovo Advisory Opinion*

The Kosovo Advisory Opinion was one of the most significant case verdicts issued by the ICJ in respect to the status of the Declaration of Independence issued by Kosovo. As Sparks remarks²⁰⁴, the Court was offered to decide whether it was legal for the people, through political choice, to choose to secede. This decision will inevitably answer two forms of self-determination: remedial and secession. This question was put to the test when colonial boundaries were drawn by the colonial power, and it was often due to the political and economic goals pursued. This ‘artificial boundaries’ forced upon groups of people to separate or merge them as a nation, were not entirely accepted by the peoples.

This persisting dilemma has been the cause of many ethnic conflicts today. Cass questioned whether the territorial boundaries should be denied by ‘a blanket prohibition’ in their pursuit of self-determination claims.²⁰⁵ Numerous events have occurred in the history of the Former Yugoslavia, beginning with the Kingdom of Serbs, Croats, and Slovenes, and ending with the Socialist Federal Republic of Yugoslavia. Six republics comprised the former Yugoslavia: Slovenia, Croatia, Macedonia, Bosnia-Herzegovina, Montenegro, and Serbia.²⁰⁶ As conflict reaches armed confrontation between Bosnia-

²⁰¹ *Id* at p. 195.

²⁰² Note also that Jack Donnelly, more generally, conceptualizes human rights not as legally enforceable but rather as entitlements on the political system. See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (2013); Klabbers, *supra* note 1 at p. 195.

²⁰³ Rodriguez-Santiago, *supra* note 79 as cited in SPARKS, *supra* note 33 at p. 141.

²⁰⁴ SPARKS, *supra* note 3 at p. 163.

²⁰⁵ Cass, *supra* note 16 at p. 32.

²⁰⁶ Tinatin Tsanova, *DO MINORITIES HAVE THE RIGHT TO SELF-DETERMINATION?* CENTRAL EUROPEAN UNIVERSITY.

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Herzegovina, Serbia and Croatia, the European Community led by Badinter's Commission was tasked with a legal question²⁰⁷, declaring Serbs and Croats to have the right to their identity, referring to the principles enshrined in Covenants and human rights duty to protect. In observing the right to self-determination, people have the right to belong to any ethnic, religious, or language groups.²⁰⁸

Under Chapter VII of the UN Charter, the UN Security Council passed Resolution 1199 on 23 September 1998, demanding that all parties, groups, and individuals immediately end hostilities and maintain a ceasefire in Kosovo. It also urged states to participate in the operations of the Kosovo Diplomatic Observer Mission. On 17 February 2008, the president, prime minister, and members of the Kosovo Assembly met to adopt the declaration of independence for Kosovo.²⁰⁹

In 2008, the General Assembly of the United Nations adopted a Resolution to ask the ICJ the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in compliance with international law?"²¹⁰ The Court indicated no prohibition on independence declarations in international law. Although it was found that there is no general rule that bars declarations of independence, it was held that a statement could become illegal if it is connected to the violation of the prohibition on the use of force.²¹¹ The Court further elaborated that "the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation."²¹² It is interesting to note, the Court further stated that such development allows people to create new State in order to claim such right.²¹³ Therefore, instances where the case of oppression can be established, the

²⁰⁷ Hannum, *supra* note 191 at p. 61.

²⁰⁸ Conference on Yugoslavia Arbitration Commission, Opinion No. 2 (Jan. 11, 1992), reprinted in 31 I.L.M. 1494 as cited in Hannum, *supra* note 191 at p. 62.

²⁰⁹ SPARKS, *supra* note 33 at p. 165.

²¹⁰ UN General Assembly Resolution 63/3, 8 October 2008.

²¹¹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (2010) ICJ Reports 403 at para 1.

²¹² *Id* at para 79.

²¹³ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (2010) ICJ Reports 403 at p. 79.

court acknowledged the right of self-determination, to a certain extent, the right of independence.

Nonetheless, Tsanava argues that the ICJ Advisory Opinion on Kosovo's case has presented new issues on the terminological distinction between the "people" and "minority." The International Court of Justice (ICJ) merely confirmed the validity of Kosovo's declaration of independence under current international law, but it also left open the possibility that Kosovo Albanians, a "minority" within Serbia, had attained the status of "people" and, as such, had the right to declare independence.²¹⁴ The Court did not directly address the issue of self-determination or evaluate whether Kosovars qualify as people with the right to self-determination.

2.6.3 Chagos Archipelago Advisory Opinion

On 22nd of June of 2017, General Assembly posed two questions to the Court of ICJ. The question are as follows:

- (a) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"
- (b) "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"²¹⁵

Chagos Archipelago were part of Mauritius, and it includes the island of Diego Garcia. As a colony of United Kingdom, the Chagos Archipelago were under the

²¹⁴ Tsanava, *supra* note 190 at p. 33.

²¹⁵ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, ICJ GL No 169 95, 1 (2019).

administration of the United Kingdom. Mauritius claimed independence from the United Kingdom on 12th March 1968. However, the issue arises when territory of Chagos Archipelago was not included in the definition of Mauritius territory in the 1968 Mauritius Constitution. It is believed that there is a separate agreement between the Premier of Mauritius and the United Kingdom on 29th June of 1964. Chagos Archipelago will be detached from Mauritius for the establishment of military base in the Island of Diego Garcia and led to the 1966 Agreement.

The Court decided that the relevant provision, the Resolution 1514 has achieved ‘a declaratory character with regard to the right of self-determination as customary norm’.²¹⁶ The Court still confines the scope of exercising the right to self-determination with regards to decolonization in Resolution 1541 as to which people are amounted to ‘non-self-governing’ territories, or colonial people which must be ethnically or culturally different and geographically separated from the colonizer. However, the Court did not discuss as to what is geographically separated means. This is probably to confine the meaning as has been previously established.

Spark further confirmed this moment where the ‘customary norm of colonial self-determination’ crystallization begins.²¹⁷ The Court stated that it “has a normative character”²¹⁸ in which the call to end all forms of colonialism would summarize as oppression by the people towards others. Judge Trindade in his separate opinion on this case, contended that right of the people cannot be dispensed with proper justice if group such as minorities were not recognized. The Court of ICJ must not restrict itself with ‘inter-State outlook’ and overlook the tragedy of ‘human suffering’²¹⁹

²¹⁶ *Id* at p. 9.

²¹⁷ TOM SPARKS, SELF-DETERMINATION IN THE INTERNATIONAL LEGAL SYSTEM: WHOSE CLAIM, TO WHAT RIGHT? 1, 213(2023).

²¹⁸ Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, ICJ GL No 169, 95 (2019).

²¹⁹ *Id* at p. 8.

Chapter 3:

THE MEANING OF 'PEOPLES' UNDER THE RIGHT TO SELF-DETERMINATION

3.1 Introduction

This study focuses on the meaning of 'peoples' under the right to self-determination in international law. To make use of the right to self-determination, based on the previous discussion, as Cass mentioned, there ought to be a group or people who would claim such a right.²²⁰ This thesis defines the meaning of people and discusses two possible groups that may claim the right to self-determination, which have been identified as people under this right. Furthermore, after discussing the scope of the two possible groups of the definition of people, this thesis also analyses the colonial condition or the extent of its application to certain circumstances which justifies proclamation towards the right to self-determination.

3.2 Finding Criteria of a Peoples

Karl Josef Partsch, a member of the Committee on the Elimination of Racial Discrimination, recognizes five situations in which the term "peoples" was associated from 1919 until 1945. According to Hannum, this identification occurred during those periods when the political form of self-determination took place.²²¹ In Paragraph 36 of his article, the identification is as follows:

- "peoples" living entirely as minority (or even as majority) groups inside a state ruled by another "people" (as the Irish before 1919 and the Mongols before 1911/1921).
- "peoples" living as minority groups in more than one state without their own statehood (as Poles in Russia, Austria and Germany before 1919).
- a "people" living as minority group in a state but understanding itself as part of a neighbouring state (Mexicans in California and Hungarians in Roumania).

²²⁰ Cass, *supra* note 16 at p. 24.

²²¹ HANNUM, *supra* note 8 at p. 35 citing Karl Josef Partsch, *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination*, 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 61 62 (1982).

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- “peoples” or “nations” forced by external influences to live in separate states (as the German nation within several states).
- a “people” living as the majority (or also as a minority group) inside a territory with a special status under foreign domination (main example: colonial regimes).

Defining “peoples” is not easy. As discussed in the resolutions and treaties, its meaning is not clarified. As Anderson observes, this dilemma, if unresolved, will cause further conflict in the future. As of now, it is unanimously agreed that the right only applies to colonial people; the trend or state practice further inclines towards a “qualified right to unilateral non-colonial (UNC) secession”.²²² This unsolved dilemma was brought up in the International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, where the undefined meaning of who constitutes a “people” could further exacerbate border conflicts, cause possible threats to national unity as well as security concerns as a whole, for the international community.²²³

According to Cassese, the term “peoples” in Article 1 of the Covenants includes (1) entire populations living in independent and sovereign states; (2) entire populations of territories that have yet to attain independence; or (3) populations living under foreign military occupation.²²⁴ According to Abe, the majority of states have no problems with the first and second categories which focus on the “entire population” for the meaning of people.²²⁵ In the case of Kosovo, Cyprus has argued, based on Resolution 1514 and Resolution 2625, that self-determination in the external form does not include minorities. However, based on the discussion in the Covenants and Helsinki Final Act, beyond the colonial context, minorities have the right to claim the internal form of self-determination.²²⁶

²²² Anderson, *supra* note 78 at p. 41.

²²³ International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations, UNESCO Paris, 27–30 November 1989, UN Doc. SHS-89/CONF.602/7 (1990) at p. 18.

²²⁴ CASSESE, *supra* note 10 at p. 59.

²²⁵ Abe, *supra* note 74 at p. 29.

²²⁶ Republic of Cyprus, “Written Statement Submitted by the Republic of Cyprus” (17 April 2009), online: ICJ <<https://www.icj-cij.org/public/files/case-related/141/15609.pdf>> at paras 129-139.

On the other hand, in the Kosovo Advisory Opinion of the ICJ, Russia submitted a counter argument stating that there are other conditions under which “an ethnic or other group within an existing State may qualify as a people”, and the interpretation is still open to debate and inconclusive.²²⁷ This counterargument is supported by a decision made by the Supreme Court of Canada in the Quebec case. The term “peoples” also might include a “portion of the population of an existing state.”²²⁸ The judgement of the Supreme Court further opined that to restrict the meaning of “people” for an entire population would render the term “duplicative”. As duly explained by the court, if the original meaning is construed as such, there is no need for the prohibition clause. According to Cassese, territorial integrity need not be mentioned as it solely refers to an entire population. Therefore, as per the Quebec case argument vs. Cassese’s argument, the opinion and argument stating that it is not exclusive to the whole population would be more appropriate and logical.

Due to the absence of a proper definition, as suggested by Abe, the criterion laid down by the United Nations Educational, Scientific and Cultural Organization (UNESCO)²²⁹ is thus:

- (a) a common historical tradition
- (b) racial or ethnic identity
- (c) cultural homogeneity.
- (d) linguistic unity.
- (e) religious or ideological affinity.
- (f) territorial connection; and
- (g) a common economic life

Experts of UNESCO also added several conditions to the common features listed above²³⁰. First, the group must achieve a certain number of people that is construed as a

²²⁷ Russian Federation, “Written Statement by the Russian Federation” (16 April 2009), online: ICJ <[https:// www.icj-cij.org/public/files/case-related/141/15628.pdf](https://www.icj-cij.org/public/files/case-related/141/15628.pdf)> at para 81.

²²⁸ Reference re Secession of Quebec, 2 SCR 217 (1998) cited in Abe, *supra* note 82 at p. 29.

²²⁹ International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations, UNESCO Paris, 27–30 November 1989, UN Doc. SHS-89/CONF.602/7 (1990), *supra* note 217.

²³⁰ *Id* at p. 19.

group rather than “a mere association of individuals” in a particular state. Second, the group has the intention or consciousness to be recognized as a unique people. Third, there must be an available institution that demonstrates their “common characteristics” and “will” for their unique identity. UNESCO admits that further research should be done in other fields, such as anthropology, sociology, and psychology to strengthen the definition of a people.

Scharf argues that it must have a “focus of identity” and “distinctiveness”. Therefore, a two-part test has been formulated to qualify a group of people to claim the right to self-determination.²³¹ First is the objective test to qualify the group based on common background, ethnic identity, linguistic elements, religious affinity, historical or cultural tradition, and territorial area the group claims to be a part of. The second part of the test, termed the “subjective prong” test, compels comprehensive analyses of individuals within the group on how far they perceive themselves as a group and the capabilities of the group to form a “viable political entity”.²³² This test is supported by Brownlie, as it is not only based on a people with “distinct character”, based on the combination of physical criteria such as cultural, language and religion, but also the psychological state of the group that must be considered.²³³ Judge Trindade acknowledges that there are objective and subjective tests similar to the above. However, according to him, the above elements only serve as a factual factor rather than a legal criterion as of now.²³⁴

Senaratne observes that Judge Trindade had significantly contributed to the test by adding a new element²³⁵ – the ‘common suffering’ which culminates in a “strong sense of identity” of the people. In the Kosovo Case Opinion, Judge Trindade concurs with the argument that Kosovar already met the criteria of a people. The elements are as follows: “(a) sharing of common background of ethnicity, language, religion, history and cultural heritage; (b) territorial integrity of the area claimed; (c) the subjective element of the

²³¹ Michael P Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT’L L. & POL’Y 373 (2002) at p. 380.

²³² *Id.*

²³³ I Brownlie, *The Rights of Peoples in Modern International Law. The Rights of Peoples*. Ed. by J. Crawford (1988) at p. 108.

²³⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, Separate Opinion of Judge Cançado Trindade, (2010).

²³⁵ SENARATNE, *supra* note 101 at p. 217.

group self-conscious perception as a distinct “people”, able to form a viable political entity.”²³⁶

The criteria of a people laid down in the separate opinion of Judge Trindade in the Kosovo Advisory Opinion is not a binding one. However, according to Article 96 of the UN Charter, “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”²³⁷ This provision must be read in conjunction with Article 57 of the ICJ Statute which states that “If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.”²³⁸ The judge may clarify and further develop any rules which are not clarified as per Article 96. Therefore, the separate opinion of Judge Trindade may be influential for further case development as well as acceptance by other organs of the United Nation as per Article 38 of ICJ Statute, “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”²³⁹

3.3 Groups Which Classify as Peoples and Their Rights

3.3.1 Minorities

Although no suggested definition of “minority” has been universally recognized by international lawyers, as indicated by Hannum, a common-sense understanding of a minority would be of a numerically smaller, non-dominant group identified by shared ethnic, racial, religious, or linguistic characteristics.²⁴⁰ This definition fits in accordance with the criteria of a people, as discussed previously. However, in the context of self-determination, “minority” does not always refer to powerlessness; in most cases, it would be appropriate to refer to them as “non-dominant majority”.²⁴¹ The notion of minority started in the Treaty of Westphalia in 1648, in which all the parties in the treaty consented

²³⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, Separate Opinion of Judge Cançado Trindade, *supra* note 228 at p. 214.

²³⁷ U.N. Charter.

²³⁸ Statute of the International Court of Justice, (1946), Article 57.

²³⁹ *Id.*, Article 38.

²⁴⁰ HANNUM, *supra* note 5 at p. 50.

²⁴¹ CHARLES WAGLEY & MARVIN HARRIS, MINORITIES IN THE NEW WORLD: SIX CASE STUDIES (1958) as cited in HANNUM, *supra* note 5 at p. 50.

to guaranteeing certain religious minorities.²⁴² According to Hannum, given the historical alignment of religious and secular authority before this time, such agreements may be seen as acknowledging the power of specific political factions rather than religious rights per se.²⁴³

During the Ottoman Empire, a unique framework called “millet” was developed by the Central Government to maintain some degree of cultural and religious autonomy. As Hannum elaborates, the millets were organized along religious lines, with each religious body having the power to control issues such as inheritance, social standing, and other intra-communal ties.²⁴⁴ The millets were also in charge of gathering taxes owed to the central Ottoman government. Some millets evolved into political or territorial entities in the later Ottoman era.²⁴⁵ Among others, the 1878 Treaty of Berlin includes provisions for the protection of religious minorities of Mount Athos in Greece.²⁴⁶ Also, in the Bulgarian Constitution of 1878, the safety of Greek and Turkish minorities was guaranteed. According to Hannum, the international treaties regarding minorities were available at the end of World War I, supervised by the League of Nation.²⁴⁷

However, under the framework of decolonization, as Benziger and Castellino observe, the notion of self-determination could only be realized with the full or partial assistance of the colonial powers responsible for drawing the border lines of colonial territories. This action condemned certain segments of the population to the status of minorities in the newly formed sovereign states under the auspices of the United Nations.²⁴⁸ The effects of this phenomenon, without considering the identities of the

²⁴² James Muldoon, *The Development of Group Rights*, CANON LAW, THE EXPANSION OF EUROPE, AND WORLD ORDER 31 (1998) as cited in HANNUM, *supra* note 8 at p. 50.

²⁴³ HANNUM, *supra* note 8.

²⁴⁴ *Id.*

²⁴⁵ 11 STANFORD J SHAW & EZEL KURAL SHAW, HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY: VOLUME 2, REFORM, REVOLUTION, AND REPUBLIC: THE RISE OF MODERN TURKEY 1808-1975 (1977) as cited in HANNUM, *supra* note 5.

²⁴⁶ HANNUM, *supra* note 5 at p. 51.

²⁴⁷ Francesco Capotorti, *United Nations, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Sales No. E.78. XIV. 16-26 (1979) cited in HANNUM, *supra* note 5 at p. 52.

²⁴⁸ Steve Allen & Joshua Castellino, *Reinforcing Territorial Regimes: Uti Possidetis and the Right to Self-Determination in Modern International Law*, 48 AMICUS CURIAE 20 (2003) at p. 20-22; Mohammad Shahabuddin, *Post-Colonial Boundaries, International Law, and the Making of the Rohingya Crisis in Myanmar*, 9 ASIAN JOURNAL OF INTERNATIONAL LAW 334 (2019) at p. 335,339,342, 343 cited in

peoples, practically favors the sovereignty of the majority over the minority. Benziger and Castellino argue that there are two outcomes.²⁴⁹ First, strict constitutional legal regimes in emerging States, combined with total faith in the inviolability of borders in international law have prevented secession. Second, States frequently denied groups the right to self-determination, regardless of their historical claim to be a people or a nation.

According to Hannum, three groups of minorities differ in their treatment according to the UN Study.²⁵⁰ The first is minorities in the existing states of the defeated Empires, such as Turkey, Hungary, Bulgaria, and Austria. The second is borne on the Ottoman Empire's breakup, such as Yugoslavia, Czechoslovakia, Romania, Poland and Greece. The first and second categories only concern the right of equality and non-discrimination, citizenship, right to preserve language, education and culture.²⁵¹ The third category is minorities established based on special rulings in Upper Silesia, Danzig, Memel and Aland Island. Territorial autonomies were afforded in cases such as in the Aland Island.

According to Hannum's observation of the UN Charter, the specific provisions to cater to the rights of minorities are non-existent. There are two assumptions made by the UN drafters in resolving difficulties arising from minority groups within an existing state that had language and cultural linkages with the neighboring countries. First, the problem can be solved if the individual rights of each minority are granted in terms of equal treatment with the majority. Second, colonial power is to promise adherence to the principle of self-determination and reassurance would be satisfactory for the minorities. As observed, the lack of compliance to the right to self-determination in these countries has caused severe hardships for minority groups, such as the Greco-Turkish conflict and mass migration of 1920-1922. The people were forced to move but the boundaries remained as it was.²⁵²

Felicitas Benziger & Joshua Castellino, *Minorities, Self-Determination, and Secession*, THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION (2023) at p. 89.

²⁴⁹ Benziger and Castellino, *supra* note 230 at p. 89.

²⁵⁰ HANNUM, *supra* note 5 at p. 51.

²⁵¹ Francesco Capotorti, *supra* note 229 at 18-19; HANNUM, *supra* note 5 at p. 53.

²⁵² Alfred M. de Zayas, *Nemesis at Potsdam, THE EXPULSION OF THE GERMANS FROM THE EAST* (1977) cited in HANNUM, *supra* note 5 at p. 57. In the 1960s, population transfer was also thought to be the best way to address harassment of the Turkish minority in Bulgaria; however, in reality, only 50,000 ethnic Turks—out of the 600,000 who had initially applied to leave the country—could afford the customs duties that were imposed on those who left.

As Hannum observed, the UN adoption of The Universal Declaration of Human Rights did not discuss minority rights.²⁵³ However, in the 1950's, there was a proposal for a Free Territory of Trieste, as well as the UN project to establish an autonomy district within Ethiopia. Hence, the Sub-Commission on Prevention of Discrimination and Protection of Minorities was set up to undertake the tasks. However, the higher-up Commission was not receptive to the proposal.²⁵⁴ Nonetheless, there was an intention of the drafters to implement the minorities' rights in Article 27 of the ICCPR²⁵⁵ as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

In the early days of the adoption, the Covenant only covered protection of culture, religion and language of the minorities.²⁵⁶ According to Hannum, the language refers to the "persons" involved instead of the right as a group per se. However, one could argue that to exercise such rights, "persons" must be a part of a community or a group to fully claim all available rights under Article 27 of the ICCPR. As Hannum observes, regional conventions such as American, European and African Charters omit direct references to minorities as a group.²⁵⁷ The UN Sub-Commission, led by Francesco Capotorti, a UN Special Rapporteur, conducted an in-depth analysis of the minority's issues.²⁵⁸ The study resulted in a follow-up action by Yugoslavia to the Commission in the form of an early draft in 1979.²⁵⁹ The draft proposal was revised²⁶⁰ as the Declaration on the Rights of Minorities (hereinafter Declaration of Minorities) and submitted to the Commission. The Commission's working group failed to agree upon a definition of "minority". In 1984, the

²⁵³ UN G.A. Res. 217A(III), 217 cited in HANNUM, *supra* note 5 at p. 58. According to Hannum, there is an acknowledgment from the committee that "it was difficult to adopt a uniform solution for this complex and delicate question [of minorities], which had special aspects in each State in which it arose. G.A. Res. 217C(III).

²⁵⁴ Francesco Capotorti, *supra* note 229 at paras 141-148.

²⁵⁵ International Covenant on Civil and Political Rights, *supra* note 27.

²⁵⁶ THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS, (Louis Henkin ed., 1981) at p. 270-275, 282-287 as cited in HANNUM, *supra* note 5 at p. 60.

²⁵⁷ HANNUM, *supra* note 5 at p. 60.

²⁵⁸ Francesco Capotorti, *supra* note 238.

²⁵⁹ Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment., E/CN.4/1367 (1980).

²⁶⁰ UN Doc. E/CN.4/Sub.2/L.734 (1981) as cited in HANNUM, *supra* note 5 at p. 60.

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Sub-Commission was requested to draft one.²⁶¹ The definition submitted by Jules Deschenes is as follows:

[A] group of citizens of a State, constituting a numerical minority and in non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.²⁶²

Hannum observed that despite the Sub-Commission's lengthy discussion about this provision, the Deschenes proposal was sent to the Commission without the Sub-Commission's approval. In 1986, the working group of the Commission decided to move forward with elaborating the draft declaration's substantive articles, instead of delaying the consideration of definitional questions, possibly due to the ongoing and unresolved debates within the Sub-Commission (or its lack of progress in previous years). The only considerable result from the discussion of the working group in 1988 was tentatively the Preamble and three articles for the said Declaration.²⁶³

The preamble of the draft Declaration of Minorities emphasizes the urgency for the State to uphold the rights of the minorities in adherence to Resolution 2625, which will "contribute to international peace and security and to the creation of more favorable conditions for the realization and promotion of human rights, including the rights of [persons belong to] [national or], ethnic, linguistic and religious minorities".²⁶⁴ The final version of the Declaration of the Minorities carries similar language, that is to "contribute to the political and social stability of States in which they live."²⁶⁵

²⁶¹ Commission on Human Rights: Report on the 40th session, 6 February - 16 March 1984, E/CN.4/1984/77 (1984).

²⁶² Proposal concerning a definition of the term "minority" submitted by Mr. Jules Deschenes., E/CN.4/SUB.2/1985/31 (1985).

²⁶³ Report of the Working Group on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, E/CN.4/1988/36 (1988), Annexes 1 and II as cited in HANNUM, *supra* note 5 at p. 61.

²⁶⁴ Report of the Working Group on the Rights of Persons belonging to National, Ethnic, Religious and Linguistic Minorities, *supra* note 254. Provisions which consensus has yet to be reach are in brackets.

²⁶⁵ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 (1992).

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In the Declaration on the Right of Minorities draft in 1988, under Article 3 paragraph 2, it is essential to note that:

[A]ll States [which have not yet done so] shall [take measures to create favourable conditions to enable (persons belonging to) minorities to freely] [ensure that (persons belonging to) minorities are freely able to] express their characteristics, to develop their [education], culture, language, religion, traditions and customs, and to participate on an equitable basis in the cultural, religious, social, economic and *political life* in the country where they live.

The provision pertaining to ‘political life’ (emphasis) which was available in the draft on self-determination under Article 3 was omitted in Article 2 of the final version. It can be observed under Article 2 of the Declaration on the Right of Minorities as follows: “Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.” However, in paragraph 3, the drafter separated it from paragraph 2, which elaborates on the political rights that minorities were to enjoy:

[P]ersons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner *not incompatible with national legislation*.

For political purposes, the drafters put a caveat or cautionary measure on the minority groups in exercising the right of self-determination. This raises the question: If such national legislation were absent or reluctant to afford political rights for minority groups to safeguard their basic rights, would this Declaration approve of such state practice? This aligns with Hannum’s observation, “By refusing to recognize even the limited “traditional” rights of minorities to religion, language, and culture, states have been themselves primarily responsible for the resurgence of minority demands in recent years.”²⁶⁶

Despite the caveat in the Declaration on the Right of Minorities, Cass argued there is confusion between the legal formulation of the right to self-determination and the state

²⁶⁶ HANNUM, *supra* note 5 at p. 73.

practice, which does not reflect the realities. Various minority groups have either obtained or are pursuing their right to self-determination, frequently with approval and consent from other countries.²⁶⁷ For example, there has been international recognition for the plight of Palestinian people, the secession of Slovenia and Croatia from Yugoslavia, and Baltic nations, as well as the Kurdish people. These are examples of the State’s readiness to accept minority self-determination claims even though it is regarded as an exception to the standard rule.²⁶⁸

3.3.2 *Indigenous*

The current norms in the state-centered worldview perceives ‘indigenous peoples’ as a group of people that are compelled to be “converted to the beliefs of the dominant,” according to Hannum’s observation.²⁶⁹ The assimilation process of the indigenous people began hundreds of years ago in Europe. While this is true in Europe, the Asian Indigenous tribes are relatively intact depending on their cultures and their remoteness from the city. Hannum observes that the intention to accord ‘Indigenous peoples’ such rights is just a recent phenomenon as it can be traced back to only thirty years prior, based on international organization reports.²⁷⁰

The Indigenous groups not only suffered systematic attacks on their way of life but also military assaults. As Hannum contended, in the Americas, nineteenth-century states and colonial powers sought to expand private properties at the expense of collective or communal holdings of Indigenous peoples who saw their way of life systematically violated. The more hostile tribes were subjugated and eradicated, whereas the more acculturated ones were forced to assimilate.²⁷¹ As MacDonald observes, indigenous peoples had eradicated their sense of identity through “aggressive and coercive assimilation” by the States, by losing the ability to speak their language, appreciate old traditions, and understand the hierarchy of their own community.²⁷²

²⁶⁷ Cass, *supra* note 16 at p. 33.

²⁶⁸ *Id* at p. 34.

²⁶⁹ HANNUM, *supra* note 5 at p. 75.

²⁷⁰ *Id* at p. 75.

²⁷¹ *Id* at p. 75.

²⁷² David MacDonald, *Indigenous Peoples and Self-Determination in Settler States*, THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION (2023) 102.

MacDonald argues that the Indigenous people have been actively excluded from participating in global politics.²⁷³ He quoted Borrow’s observation, “For over five hundred years, international law has prevented Indigenous Peoples from participating in the global order. Doctrines of discovery and theories of *terra nullius* considered Indigenous Peoples lower on the so-called scales of civilization.”²⁷⁴

Under the purview of United Nations, the Economic and Social Council embarked on a study to define the Indigenous people in 1982.²⁷⁵ Special Rapporteur for the UN Indigenous Study, Jose. R Martinez Cobe noted that the definitions provided by various public authorities worldwide and the Indigenous people themselves were discussed. Hannum observed that international organisation such as the International Labor Organization (“hereinafter” ILO”), during the preparation of the 1988 International Labor Conference, had decided to recognize Indigenous peoples as “peoples” rather than a part of “populations”.²⁷⁶ Other significant definitions given by World Council of Indigenous People in the report is as follows:

“The Word Council of Indigenous Peoples declares that indigenous peoples are such population groups as we are, who from old-age time have inhabited the lands where we live, who are aware of having a character of our own, with social traditions and means of expression that are linked to the country inherited from our ancestors, with a language of our own, having certain essential and unique characteristics which confer upon us the strong conviction of belonging to a people, who have an identity in ourselves and should be thus regarded by others.” (Res.2 Argentina)²⁷⁷

As summarized from the definitions discussed in the UN Indigenous Study by Hannum, the definition of indigenous people or as a group consists of criteria such as

²⁷³ *Id* at p. 103.

²⁷⁴ John Borrows, *Indigenous Diversities in International Investment and Trade*, in INDIGENOUS PEOPLES AND INTERNATIONAL TRADE 11 (John Borrows & Risa Schwartz eds., 1 ed. 2020) at p. 12 cited in MacDonald, *supra* note 256 at p. 103.

²⁷⁵ See generally Gudmundur Alfredsson, *Fourth Session of the Working Group on Indigenous Populations*, 55 NORDIC J. INT’L L. 22 (1986) as cited in HANNUM, *supra* note 5 at p. 84.

²⁷⁶ HANNUM, *supra* note 5 at p. 78.

²⁷⁷ UN Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 34th session : study of the problem of discrimination against indigenous populations, E/CN.4/RES/1982/19 (1982) in Chapter V, Definition of indigenous populations E/CN.4/Sub.2/1982/2/Add.6.

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“ancestry, culture, (including religion, dress, livelihood and living as a member of tribal system), language, residence, group consciousness or self-identification, and acceptance by an indigenous community.”²⁷⁸ This criteria or test called the “objective test,” aligns with the definition of people by UNESCO in our previous discussion. The differentiation between the usual definition of ‘people’ and ‘indigenous’ is due to the indigenous people’s strong linkage to land and their ancestries from the pre-colonial or pre-conquest times.

According to Hannum, the subjective test was also included using the criteria above; both the individual and the community have the right to define themselves as an indigenous people, and belongs to the group of people.²⁷⁹ This position was reiterated by Special Rapporteur Jose Martinez under paragraph 8 in the UN Indigenous Study as follows:

[B]efore entering into the analysis of definitions and criteria applied by public authorities in the different countries covered in the study to define indigenous populations, it should be pointed out that indigenous populations themselves have claimed the right to do so themselves as an exclusive right on their part.

Under paragraph 377 in the UN Indigenous Study Conclusion, Indigenous people have the right to reclaim their lands which had been illegally taken. The demands include retaining their unique culture, language, social and legal institutions. The nation-states are obligated to honor and fulfill this requirement for their survival as an Indigenous people.²⁸⁰ As per Hannum’s observation, UN Working Group later improvised a working definition for future review as follows:

[I]ndigenous communities, peoples and nations are those 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 societies now

²⁷⁸ HANNUM, *supra* note 5; UN Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 34th session: study of the problem of discrimination against indigenous populations, *supra* note 262.

²⁷⁹ HANNUM, *supra* note 5 at p. 88.

²⁸⁰ UN Commission on Human Rights, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 34th session: study of the problem of discrimination against indigenous populations, *supra* note 257 at p. 50 under Chapter XXI-XXII, Conclusions, proposals and recommendations.

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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 their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. . . .

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted.²⁸¹

Therefore, it is not the obligation of the international community to define them as they have exclusively reiterated their right to define. Moreover, they would dismiss their case as familiar or closer to the minority issues.²⁸² As Hannum opined, this quest for “definitional questions” only becomes significant when their inclusion or removal from a given definition has legal ramifications. Most States do not oppose an indigenous people's complete self-definition for social or cultural reasons; however, many will object to this implementation if it requires duties from the state to the individuals or groups that could be used as legal leverage against other public or private entities.²⁸³

Nonetheless, the World Council of Indigenous People took the initiative in 1984 to adopt a declaration stating, “All Indigenous Peoples have the right to self-determination.” In the next year, the declaration extended their right to self-determination to include the right to autonomy. This extends to political, economic, social, religious, and cultural domains. Interference in the right will not be tolerated.²⁸⁴ The said UN Declaration on the Rights of Indigenous Peoples²⁸⁵ (hereinafter “Declaration of Indigenous Peoples”) “passed with 144 positive votes, 11 abstentions and 4 voting against (Australia, New

²⁸¹ *Id* at p. 50-51 under Paragraph 378.

²⁸² Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AMERICAN JOURNAL OF INTERNATIONAL LAW 369 (1986) at p. 376 cited in HANNUM, *supra* note 5 at p. 90.

²⁸³ HANNUM, *supra* note 5 at p. 91. For example, China does not object to refer its “national minorities” as “indigenous peoples” on definitional terms. It is believed China fears this clear-cut definition would embolden the ethnic-minority-indigenous people to further demand more claims from the central government.

²⁸⁴ EI Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the United Nations Declaration on the Rights of Indigenous Peoples*, MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 48 (2009) at p. 51 cited in MacDonald, *supra* note 256 at p. 108.

²⁸⁵ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007), enacted on 2nd October 2007.

Zealand, Canada and the United States).”²⁸⁶ The Declaration of Indigenous Peoples aims for the collaboration of effort between the states and Indigenous peoples. As Lightfoot summarises, the end objective would be achieved by both parties in consulting, recognizing and ultimately protecting the self-government or autonomy arrangement provided by the Indigenous people.²⁸⁷

We will examine relevant articles in the said declaration on the right to self-determination of the Indigenous peoples. The Declaration is an explicit pronouncement by the UN afforded to a minority group of people to exercise their political rights towards a majority group or settler states. Article 3 in the Declaration of Indigenous Peoples reads as follows: “Indigenous 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.”²⁸⁸ Clearly This article demonstrates that the Indigenous peoples have been recognized as a “people” under the United Nations, having full right to exercise self-determination. By possessing this right as a community and at the individual level, they are free to determine their future and protect their identity and the survivability of their group.

Article 4, as MacDonald observes, directly mentions right to autonomy or self-government for Indigenous people as well as the financial means to govern them.²⁸⁹ Article 5 indicates that while preserving their “political, legal, economic, social and cultural institutions,” Indigenous peoples are not barred or prevented from enjoying the privileges of a citizen of the state where the group resides. Article 23²⁹⁰ further supports Article 5, which gives Indigenous people access to participate in policymaking and the right to be administered by their own people. Article 18²⁹¹ elaborates on Article 5, which guarantees the right of Indigenous peoples to participate in “decision-making institution”, with representatives chosen amongst them. Article 19²⁹², according to MacDonald, is

²⁸⁶ MacDonald, *supra* note 256 at p. 108.

²⁸⁷ Sheryl R Lightfoot & David MacDonald, *Treaty Relations between Indigenous Peoples: Advancing Global Understandings of Self-Determination*, 19 NEW DIVERSITIES 25 (2017) at p. 25-39 as cited in MacDonald, *supra* note 256 at p. 108.

²⁸⁸ Article 3, United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 276.

²⁸⁹ MacDonald, *supra* note 256 at 108.

²⁹⁰ Article 23, United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 276.

²⁹¹ Article 18, *Id.*

²⁹² Article 23, *Id.*

significant as it cautions the state to acquire “free, prior, and informed consent” from the Indigenous people before deciding to implement any legislation or policies that “may affect them”.²⁹³

3.4 *Extent of Application for Colonial or Oppressed People*

According to McCorquodale, most states agreed that people under colonial power were accorded the right to exercise self-determination. However, less can be said about its application beyond it. As per previous discussion, even though the era of colonial power has ended, several non-self-governing territories that exist or under a similar type of oppression, domination, or oppression are still recurring.²⁹⁴ Therefore, the scope of the discussion will encompass both traditional and possible extensions of application.

Self-determination inclusion in the UN covenants cemented its position under the international law as a right.²⁹⁵ The international community does not dispute it as such.²⁹⁶ According to Hannum, there is still uncertainty regarding its application beyond colonial era²⁹⁷. McCorquodale also supports this statement on its applicability “beyond non-colonial situations”.²⁹⁸ In another situation, Maguire explains that there are “self-determination claimants who assert a colonial experience but do not meet the archaic ‘salt-water’ test.”²⁹⁹ It is a test whereby a colonial territory and its inhabitants must be physically and ethnically apart from the colonizing power to pass the "salt-water" test of colonialism.

3.4.1 *Conventional Salt-Water Test*

According to Cassese, in the earlier stages of self-determination, the Charter does not intend to provide such rights to ethnic minorities and colonial people. It also does not

²⁹³ *Id* at p. 108.

²⁹⁴ McCorquodale, *supra* note 4 at p. 862.

²⁹⁵ Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1 (1993) 1.

²⁹⁶ *Id* at p. 31.

²⁹⁷ *Id.* at p. 31 as cited in Amy Maguire, *Contemporary Anti-Colonial Self Determination Claims and the Decolonisation of International Law*, 22 GRIFFITH L. REV. 238 (2013) at p. 238.

²⁹⁸ McCorquodale, *supra* note 4 at p. 860.

²⁹⁹ Maguire, *supra* note 285 at p. 238.

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oblige the State Members to conduct democratic and fair elections.³⁰⁰ According to Harris, the conventional view is that this right should be restricted to ensure the continuation of “international harmony”³⁰¹ in the post-colonial world. The intention is foreseeable: to prevent the breakup of existing states. Therefore, ethnic minorities that do not fall under the colonial ‘salt-water’ test could not afford the right to claim self-determination.³⁰²

The basis of the ‘salt-water’ thesis or the ‘Blue Water Principle’ test is laid down in Resolution 1541, whereby it must be “of a territory which is geographically separated” by an ocean.³⁰³ According to Abe, this thesis originated from Congolese leader Patrice Lumumba, whose approach differs from Belgium's. This ‘salt-water’ thesis proposed that “territories that were separated by at least thirty miles of open sea from its colonizers were recognized as colonies.”³⁰⁴

MacDonald explained this was what ‘geographically separate’ meant in Resolution 1541, passed in 1960.³⁰⁵ For example, the Australian Law Reform Commission (A.L.R.C) strictly limited its application of the right to exercise self-determination based on this understanding of the ‘salt-water’ test in its Aboriginal Customary Law. The statement is as follows:

Advocates for ethnic, indigenous or linguistic minorities sometimes rely upon the principle or right of self-determination in international law as a basis for claims to political or legal recognition. So far however, the principle has been confined in international practice to situations involving separate (‘colonial’) territories politically and legally subordinate to an administering power.”³⁰⁶

³⁰⁰ CASSESE, *supra* note 10 at p. 43.

³⁰¹ D. J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* (3rd ed ed. 1983); Cass, *supra* note 16 at p. 29.

³⁰² Cass, *supra* note 16 at p. 29.

³⁰³ Principle IV, G.A. Res. 1541 (XV), U.N. Doc A/RES/1541 (Dec. 15, 1960), *supra* note 122.

³⁰⁴ CHURCHILL, *supra* note 135 at p. 18 cited in Abe, *supra* note 82 at p. 26.

³⁰⁵ MacDonald, *supra* note 283 at p. 103.

³⁰⁶ A.L.R.C REPORT No. 31 RECOGNITION OF ABORIGINAL CUSTOMARY LAW (1986).

Therefore, the ALRC based on international practice, has decided to confine the right to self-determination to the colonial context. This statement has its basis centred on the Resolution 1514 exemption clause, which states:

Any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

As argued by MacDonald, the State has the ultimate power “to either grant or withhold recognition” regarding their rights to exercise self-determination.³⁰⁷

3.4.2 *Contemporary Human Rights Approach*

McCorquodale observes that beyond the parameters of colonialism, there is no majority opinion on the application of the right to self-determination for these peoples. However, he believes that there is enough evidence to support counterarguments on the application on the right to self-determination beyond the colonial context. Cass further questions if this interpretation ought to be true. For example, there are people who are not under colonial rule and live within the pre-existing border such as the case of former Soviet Union countries who successfully claimed the right to self-determination. Therefore, based on this interpretation, previous self-determination cases would have been invalid.³⁰⁸

Abe argues that Article 1 of the Covenants could be applied beyond the restrictive interpretation and this opinion is supported by McCorquodale³⁰⁹. This view is also supported by Raic, referring to the Article 1 (3) of the Covenants – the language formulated does not limit itself to “Non-Self Governing and Trust Territories”. In other

³⁰⁷ MacDonald, *supra* note 283 at p. 104.

³⁰⁸ “These would include for example, claims by the peoples of the republics of the former Soviet Union against Moscow, by Croatia, Slovenia and Macedonia against Yugoslavia, by the Serbian minority of Krajina against Croatia, the Bougainville claim against Papua New Guinea and the list goes on.” cited in Cass, *supra* note 16 at p. 30.

³⁰⁹ McCorquodale, *supra* note 4 at p. 860 citing MANFRED NOWAK, UNITED NATIONS COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (1993) at p. 12. McCorquodale argues Article. 1(3) wording of “including those” applied to all people as per 3rd Committee intention. Reservation made by India were strongly objected by several states, among them Germany and Netherlands.

words, other states which are parties to the Covenant are obliged to realize the right to self-determination, even outside the parameter of colonial situation.³¹⁰

Therefore, as Maguire argues, “the mission of decolonization has not come to an end.”³¹¹ Maguire, citing Simpson, observes that even after the Empire’s colonial power no longer exists, there are still states behaving likewise to its imperial past or still retain their imperial mentality towards other people.³¹² The UN Human Rights Committee made a General Comment to Article 1 of the Covenants as follows:

[T]he obligations [under Article] exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant [i.e. are in colonial territories]. It follows that all State parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination.³¹³

McCorquodale notes that colonial and oppressed people were mentioned in Article 20 (2) of the African Charter. The provision is as follows, “colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community”.³¹⁴ Robbins believes that the exact meaning of ‘or’ is not absolute. The wording of ‘or’ may mean an inclusive disjunction which “assumes that either one or both of the terms or propositions on either side of the disjunction are true”.³¹⁵ Therefore, this right could be exercised in cases where people are oppressed, likewise, in cases similar to colonial people.

³¹⁰ Abe, *supra* note 74 at p. 29. See also RAIC, *supra* note 51 at p. 229.

³¹¹ Maguire, *supra* note 285 at p. 250.

³¹² Gerry J Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT’L L. 255 (1996) at p. 255 cited in Maguire, *supra* note 285 at p. 250.

³¹³ UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples, 13 March 1984, *supra* note 144 at p. 143.

³¹⁴ African Charter on Human and Peoples’ Rights (“Banjul Charter”), CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982) (1986).

³¹⁵ Ira P Robbins, *And/or and the Proper Use of Legal Language*, 77 MD. L. REV. 311 (2017) 311, 318. The example used by Robbins, “A sentence like, “X will call or email Y,” does not necessarily denote an exclusive disjunction, but rather, it leaves open the possibility that X could call and email Y.

McCorquodale observes that “subjugation, domination, or exploitation had occurred or was recurring”.³¹⁶ This situation was comparable to colonialism in South Africa,³¹⁷ and the UN had reviewed such an event in 1910. It is an important example to illustrate even though decolonization or self-determination has been exercised, oppression still befall a part of the population.

The decolonization process was flawed in that Britain only granted independence to the colonizer population but left them unrepresented. Even after South Africa's independence, elements of continuing domination and oppression persisted. In Kosovo Advisory Opinion case, Benziger and Castellino agrees with Cassese that territorial integrity can be overrule where “only in cases of serious and persistent injustices.”³¹⁸ The only clear example is Bangladesh's secession, which continuous discrimination happened as noted by Benziger and Castellino.³¹⁹ It was concluded by the International Commission of Jurist, if discrimination occurs against one of the groups in the State, the right of self-determination would be available for the oppressed people to exercise their rights.³²⁰

This study inclines towards Crawford's argument on Article 1(2). To define a people, it must be based on the context and unique situation of a particular case.³²¹ Furthermore, exercising these rights, as Hannum observes, would be their only resort to preserving their identities “whether they are classified as minorities, indigenous peoples, regional or cultural communities”.³²² Under current development of international law, by default the right to self-determination is for the whole population. For non-dominant majority, international law gave such right to the indigenous people to determine their political status. However, such right was not afforded for the minorities unless there is a clear proof of oppression by the government which clearly demonstrate distinction or non-favorable treatment towards specific groups in their respective state.

³¹⁶ McCorquodale, *supra* note 4 at p. 862.

³¹⁷ Seminar on the Legal Status of the Apartheid Regime and Other Legal Aspects of the Struggle against Apartheid, A/39/423/S/16709 (1984). “The colonial nature of the South African regime, the Seminar recognized, arises from the institution and operation of the apartheid system in South Africa.”

³¹⁸ ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 1, 119-120 (1995) cited in Felicitas Benziger & Joshua Castellino, *Minorities, Self-Determination, and Secession*, THE ROUTLEDGE HANDBOOK OF SELF-DETERMINATION AND SECESSION 1, 98 (2023).

³¹⁹ Benziger and Castellino, *supra* note 315 at p. 38.

³²⁰ Reports on Events in East Pakistan, (1971) cited in McCorquodale, *supra* note 4 at p. 862.

³²¹ THE RIGHTS OF PEOPLES, (James Crawford ed., 1988) at p. 169 as cited in Abe, *supra* note 74 at p. 29.

³²² Hannum, *supra* note 283 at p. 62.

The human rights approach in the case of self-determination, as Hannum opines, would be more feasible in both interpreting and applying to a specific situation. This approach is based on its inclusion in the Covenants and set of criteria that would need to be identified and proven on a case-by-case basis. In conclusion, this approach would provide an alternative to the “conflicting claims of centuries-old historical and territorial exclusivity.”³²³

³²³ *Id* at p. 63.

Chapter 4:

ELIGIBILITY OF PATANI AS A PEOPLE TO CLAIM THE RIGHT OF SELF-DETERMINATION

4.1 Introduction

This thesis discusses the eligibility for the right of self-determination of the Patani people and its application. For this purpose, this thesis will use the test suggested by Judge Trindade in the Kosovo Advisory Opinion case to determine whether the Patani people are a non-dominant majority group of ‘people’ recognized under international law. This thesis will also analyze the contemporary anti-colonial claim made by Patani people toward the Kingdom of Siam / Thailand. If Patani people is not a colonial people, what would be the alternative for them to claim the right to self-determination.

4.2 Patani as a People under Judge Trindade’s Test

4.2.1 Common Background (Historical, Language, Religion)

There are several assertions that the Patani people can be traced back to the 2nd century of the Kingdom of Langkasuka.³²⁴ The inscription of Chinese visitors who visited Southeast Asian countries mentions a city-state named Lang-Ya Shiu, or Langkasuka.³²⁵ According to European historians, the kingdom of Langkasuka is situated between Singgora (Songkhla) and Kelantan.³²⁶ In the late 13th-century map of Nagara-Kertagama, the Nusantara region is depicted at the northern edge of the map. The word ‘Nusantara’ evokes a sense of familiarity among the Indigenous people in the Southeast Asian region. According to Anwar et. al, ‘Nusantara’ means ‘bangsa serumpun’ (compatriot kin), based on the shared characteristics of the people’s “spoken language, belief, way of lifestyle, skin colours, and domicile”.³²⁷

³²⁴ ANUAR NIK MAHMUD, *SEJARAH PERJUANGAN MELAYU PATANI, 1785-1954* 1, 15 (1999).

³²⁵ PAUL WHEATLEY, *THE GOLDEN KHERSONESE: STUDIES IN THE HISTORICAL GEOGRAPHY OF THE MALAY PENINSULA BEFORE AD 1500* 1, 387-412 (1961) cited in Mahmud, *supra* note 339 at p. 15.

³²⁶ Mahmud, *supra* note 339 at p. 15.

³²⁷ Anwar OdM, Z Zakaria & WAFW Hashim, *Nusantara: Delineating Its Authentic Map Based on Indigenous Sources*, 4 INTEL PROP RIGHTS 2, 1 (2016).

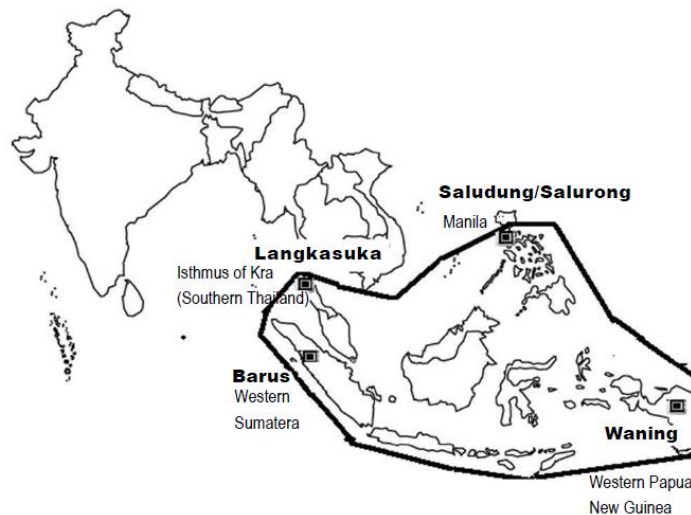


Figure 1: Map of Nusantara³²⁸

The Gulf of Langkasuka (now known as Pattani Bay), was among the most important trading ports in the 8th century, functioning as a safe harbour for ships seeking refuge from the monsoon storms. At the coast of Patani, there was a fishing village led by a man named Tani. The villagers conferred to him the title ‘Bapak’ as a sign of respect. The village grew and prospered and later became known as Kampung Pak Tani.³²⁹

There was a king called Raja Phya Tu Kerab Mahayana³³⁰, who ruled Kota Mahligai.³³¹ As it was far away from the sea and the Pattani Bay, the Kingdom went into a decline. The King’s son, Phya Tu Antera³³² then moved Kota Mahligai’s capital to the village of Pak Tani and established a royal capital there, later known as Patani.³³³

³²⁸ Slamet Mulyana, *Nagarakretagama Dan Tafsir Sejarahnya* (1979) cited in Anwar OdM, Z Zakaria & WAFW Hashim, *Nusantara: Delineating Its Authentic Map Based on Indigenous Sources*, 4 INTEL PROP RIGHTS 2 (2016).

³²⁹ IBRAHIM SYUKRI, *HISTORY OF THE MALAY KINGDOM OF PATANI* 1, 14 (2005).

³³⁰ ANDRIES TEEUW ET AL., *HIKAYAT PATANI* (1970) at p. 3. This opinion is based on the writing of Tome Pires and Admiral Cheng Ho to this region circa 1404-1433 AD cited in Mahmud, *supra* note 339 at p. 15.

³³¹ Mahmud, *supra* note 339 at p. 15.

³³² *Id* at p. 16.

³³³ IBRAHIM SYUKRI, *supra* note 343 at p. 15.

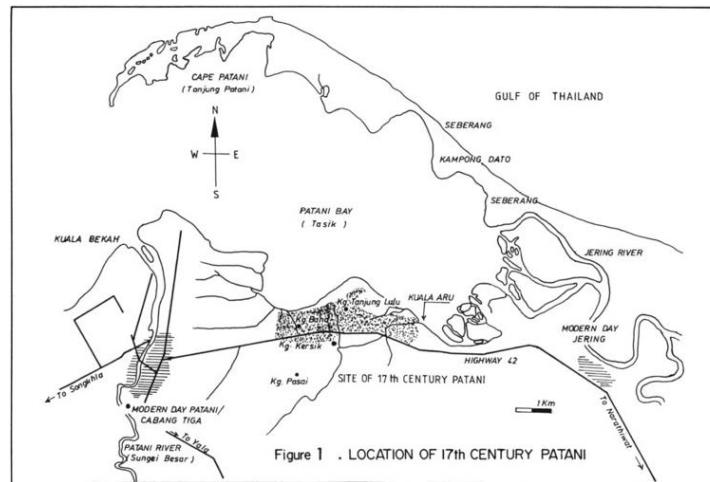


Figure 2: Location of the center of Patani Kingdom³³⁴

The Kingdom of Patani flourished due to the strategic location of the newly established capital. Between the 14th and 15th centuries, Patani flourished with visitors and traders converging from the East and West.³³⁵ Patani became a mid-level pepper port, especially after the Portuguese captured Malacca in 1511. Economically, the Kingdom was also a major player in the import market for Chinese goods, including those of Japan, Sulawesi, Borneo, Java, and Sumatra.³³⁶ Patani's success and prosperity in the 17th century attracted the Dutch and English merchants eager to make a profit there.³³⁷

In 1784, Siam triumphed in its war with Burma at Ligor (Nakhon Sri Thammarat). Under King Rama 1 of the Chakri dynasty, the Siam Kingdom further pushed its war campaign downwards to defeat the Sultanate of Patani in 1785.³³⁸ After 1786, the Patani Sultanate became a vassal to the Siamese Kingdom (see Figure 3). Although subjugated, it was not completely absorbed by Siam. Patani had its own autonomy, with the Sultan as the sovereign ruler.³³⁹

³³⁴ Wayne Bougas, *Patani in the Beginning of the XVII Century*, 39 ARCHIPEL 113 (1990).

³³⁵ TEEUW ET AL., *supra* note 344 at p. 3.

³³⁶ Francis R Bradley, *Moral Order in a Time of Damnation: The Hikayat Patani in Historical Context*, 40 JOURNAL OF SOUTHEAST ASIAN STUDIES 267, 282 (2009).

³³⁷ 1 WILLEM PIETER GROENEVELDT, *DE NEDERLANDERS IN CHINA: DE EERSTE BEMOEIINGEN OM DEN HANDEL IN CHINA EN DE VESTIGING IN DE PESCADORES* (1898) cited in Bradley, *supra* note 352 at p. 282.

³³⁸ IBRAHIM SYUKRI, *supra* note 345 at p. 41.

³³⁹ Thanikun Chandra, *Political Participation during Conflict: A Case Study of the Conflict Areas in Songkhla and Pattani Provinces of Thailand* 1, 9 (2017).

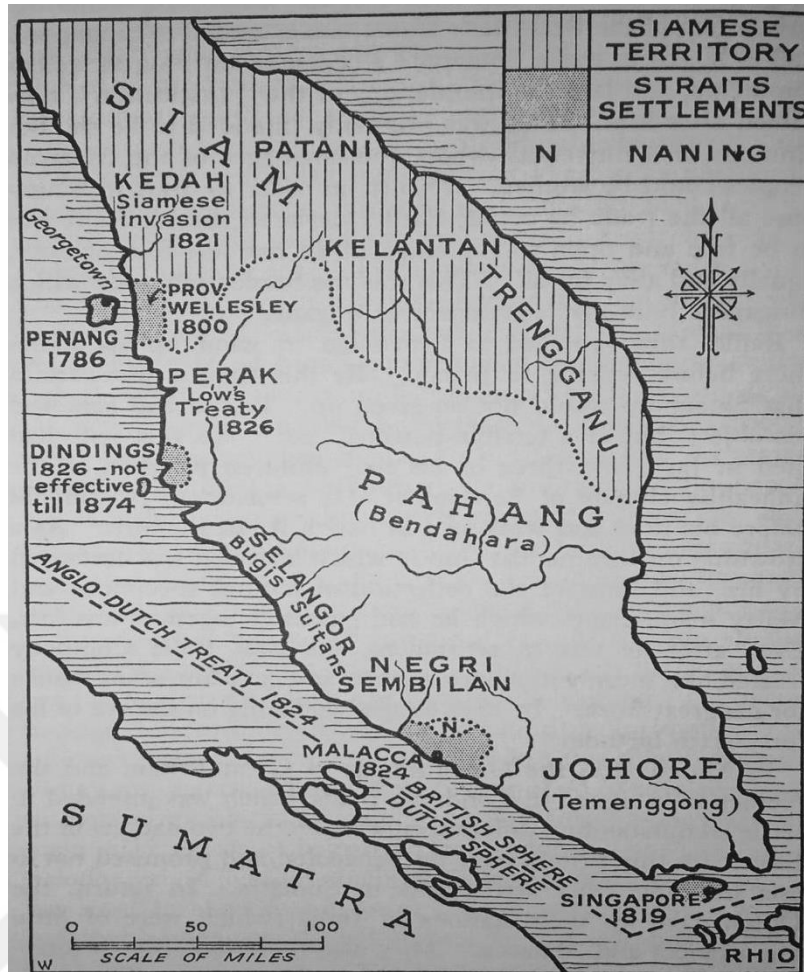


Figure 3: Patani under the Siamese rule.³⁴⁰

Abdullah, citing the Thailand Survey Office report of 2007, claims that there are currently two million people in the regions of Patani, Yala, Narathiwat, Satun and Songkhla. There are also one million people in Nakhorn Sri Thammarat and Bangkok.³⁴¹ According to UNHCR, Thailand's population was projected to reach 68 million in 2016, with Muslims accounting for 5-10% of the total population. Of the Muslim population, 18% are ethnic Malays comprising approximately 1.5 million people.³⁴² The majority of the Malay Patani people have consolidated around Isthmus Kra. Abdullah cited Teeuw & Wyatt's observation that despite living in Siam-Thai, the people still adhere to their identity as Patani Malay. Ahmat et al. explain that Kelantan and Patani people were previously inseparable, sharing a common family tie, kinship, or tribal relationship, even

³⁴⁰ Thanikun Chandra, *Political Participation during Conflict: A Case Study of the Conflict Areas in Songkhla and Pattani Provinces of Thailand* 1, 12 (2017).

³⁴¹ Abdullah, *supra* note 35 at p. 103.

³⁴² World Directory of Minorities and Indigenous Peoples - Thailand: Malay Muslims, REFWORLD, <https://www.refworld.org/reference/countryrep/mrgi/2018/en/64618> (last visited Mar 29, 2024).

after the 1909 Anglo-Siamese Treaty.³⁴³ This argument is further supported by Alias and Ahmat, who contended that the continuation of the Patani Kingdom lineage comes from the dynasty of Long Yunus, the ruler of Kelantan.³⁴⁴ The 1909 Anglo-Siamese Treaty further alienated Patani from the ‘cradle of Malay and Islamic civilizations’ and from the rest of Tanah Melayu, then Malaya and later on Malaysia.³⁴⁵

In the old Patani Kingdom, Malay language, or Yawi, was the language of communication. Three groups of people are said to be still using the Malay language. First group speaks Patani Malay fluently and can read and write Jawi. The second group speaks Patani Malay but cannot read or write Jawi. The third group does not speak Malay and resides only in Satun.³⁴⁶ It can be summarized that Satun people differ from those in the Patani region. According to Assoc. Prof. Dr. Haniff Ahamat, Satun people speak a dialect similar to that of Perlis and Kedah in Malaysia and accept Siamese as their main language.³⁴⁷ Therefore, Satun people could not be considered as Patani people. According to the interviews with the participants conducted with Chapakia, Pathan, Suetair, Taib, Yamadibu and Dengni³⁴⁸, they agreed that the Patani people speak a Malay dialect called Yawi. Furthermore, from the interviews, three participants explicitly³⁴⁹ do not refer to Satun people as their people because of the dialect difference.

³⁴³ Mustafa Ahmad et al., *Anglo-Siamese Treaty Of 1909: Its Implications on Kelantan's Political and Delineation Status*, EUROPEAN PROCEEDINGS OF SOCIAL AND BEHAVIOURAL SCIENCES 386, 387 (2019).

³⁴⁴ Nizamuddin Alias & Haniff Ahamat, *Sejarah Persempadanan Kelantan-Patani: Kesannya Kepada Evolusi Ketamadunan Islam Dan Politi Melayu Semenanjung: The History of Kelantan-Patani Border Delineation: Its Effects to the Islamic Civilisational Evolution of Malay Peninsula Politics*, 18 JOURNAL OF AL-TAMADDUN 117, 124 (2023).

³⁴⁵ SURIN PITSUWAN, ISLAM AND MALAY NATIONALISM: A CASE STUDY OF THE MALAY-MUSLIMS OF SOUTHERN THAILAND (1982) cited in Alias and Ahamat, *supra* note 378 at p. 126.

³⁴⁶ Abdullah, *supra* note 35 at p. 103.

³⁴⁷ Haniff Ahamat, *Question Regarding Right to Self-Determination for Patani People*, (2024).

³⁴⁸ Ahmad Omar Chapakia, *Vice Rector of Fatoni University*, (2023); Muhamad-Ayub Pathan, *Journalist*, (2023); Abdul Roning Suetair, *Faculty of Islamic Sciences, Patani State University (PSU)*, (2023); Hasan Taib, *Former Spokeperson for BRN*, (2023); Hasan Yamadibu, *Head of Bunga Raya Foundation*, (2023); Aladee Dengni, *Former President of Civil Society Assembly for Peace*, (2023).

³⁴⁹ Taib, *supra* note 337; Chapakia, *supra* note 337; Dengni, *supra* note 337.



Figure 4: Malay Patani Dialect speaking region.³⁵⁰

As Abdullah observes, the people of Patani remained unhinged by the assimilation process and persisted in using Yawi or Malay language.³⁵¹ The strong preservation of Bahasa Patani has strengthened the ethnic and cultural identities of the Patani people to this day. Bahasa Patani is still spoken in the Chana district in the Songkhla province. Dalrymple agrees with Perkasa that the Chana district is the “current day northernmost extent of the Malay-speaking World on mainland Asia”³⁵², although the fluency of the Patani Malay language has waned throughout generations.³⁵³

In the formation years, the King and the people of Patani were Hindus of the Mahayana sect.³⁵⁴ One day, the King caught leprosy and he would grant a wish to whomever could cure him. A saint called Syeikh Syafialudin from the Kingdom of Pasai (later Aceh) sought refuge in Patani from the Hindus’ attack. He cured the King and wished for the King and his Kingdom to accept Islam.³⁵⁵ According to Mills, based on the writings of D’Eredia, a Portuguese visitor, Islam arrived in Patani earlier than Malacca.³⁵⁶ King Phya Tu Antara, the son of the first King, embraced Islam in the hand of a scholar named Syeikh Said from the Kingdom of Pasai. Syeikh Said gave the King a new name – Sultan Ismail Syah Zillullah Dil Alam.³⁵⁷

³⁵⁰ Afnan Due-Reh & Arie Kusuma Paksi, *The Tragedy of Conflict Irresolution: Peace Dialogue in Southernmost Thailand* 206, 209 (2021).

³⁵¹ Abdullah, *supra* note 36.

³⁵² KIJANGMAS PERKASA, PATANI: BEHIND THE ACCIDENTAL BORDER 1, 170 (2008).

³⁵³ KIJANGMAS PERKASA, PATANI: BEHIND THE ACCIDENTAL BORDER 1, 170 (2008).

Id at p. 167-168; GRAHAM HAMILTON DALRYMPLE, *MELAYU TO THAI MUSLIM: HISTORICAL AND THEORETICAL PERSPECTIVES ON ETHNONYMS, ETHNOGENESIS AND ETHNIC CHANGE AMONGST MUSLIMS IN SONGKHLA PROVINCE* 1, 27 (2021).

³⁵⁴ *Id* at p. 15.

³⁵⁵ *Id* at p. 16.

³⁵⁶ Lennox A Mills, *British Malaya*, in *SOUTHEAST ASIA COLONIAL HISTORY* V3 209 (2021) cited in Mahmud, *supra* note 339 at p. 16.

³⁵⁷ Mahmud, *supra* note 339 at p. 16.

4.2.2 Territorial Integrity or Connection of The Area

The Patani Kingdom or Sultanate of Patani was subjugated along with Kedah, Kelantan, and Terengganu in 1785.³⁵⁸ According to the History of Patani Malay Kingdom, before the conquest by Siam in 1785, the border of Patani with Siam was in the district of Tepha (see Figure 4). Tepha is a Siamese corruption of the word ‘tiba’, meaning “arrive” in the Malay language.³⁵⁹ It is said that Chana, (Na Thawi was previously under Chana), Tepha and Saba Yoi districts were formerly under Patani until Songkhla absorbed it during the reign of Rama VI (1910-1925).³⁶⁰



Figure 5: Borders of Songkhla (Siam) and Chana (Patani) in 1900³⁶¹

In 1809, King Rama II of the Kingdom of Siam imposed strict measures to weaken the Sultanate of Patani and strengthen the central administration of Bangkok from all its dependencies.³⁶² In 1810, the Sultanate of Patani was divided into seven Malay provinces (Khaek Chet Hua Mueang). The seven Malay provinces are Pattani, Yaring, Yala, Ra-

³⁵⁸ Tej Bunnag & Tej Bunnag, *The Provincial Administration of Siam from 1892 to 1915* 1, 57 (1969).

³⁵⁹ IBRAHIM SYUKRI, *supra* note 345 at p. 40.

³⁶⁰ GRAHAM HAMILTON DALRYMPLE, *MELAYU TO THAI MUSLIM: HISTORICAL AND THEORETICAL PERSPECTIVES ON ETHNONYMS, ETHNOGENESIS AND ETHNIC CHANGE AMONGST MUSLIMS IN SONGKHLA PROVINCE* 1, 109 (2021).

³⁶¹ Map of the Kingdom of Siam and its dependencies / From Government surveys under the direction of J. McCarthy by order of H.R.H. Prince Mahisra Rajarudhu. Surveying and exploring in Siam, <https://collections.lib.uwm.edu/digital/collection/agdm/id/8160/> (last visited Apr 4, 2024).

³⁶² Chantra, *supra* note 356 at p. 9.

ngae, Nongchik, Saiburi and Raman. At the time, resistance was minimal because a Malay monarch still ruled each district in its internal affairs without intervention from Bangkok.³⁶³

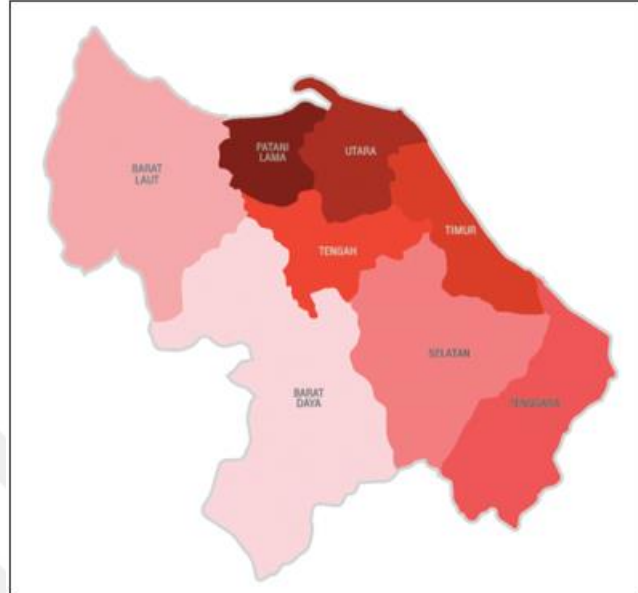


Figure 6: Region of Patani Kingdom³⁶⁴

The final straw of the Patani Kingdom came in 1902, when the Raja or Sultan lost his sovereignty, his right as a Malay, and the ownership of the Patani Kingdom towards the land was ultimately abolished. The last lineage of the Patani Kingdom from the Kelantan bloodline ended with the death of Tungku Abdul Kadir.³⁶⁵ In 1906, under the rule of King Rama V or better known as King of Chulalongkorn, he was aware of the threat of British intrusion in the north and the South. He broke the Patani Kingdom into seven provinces, which are now rearranged into four territories called Changwat of Patani, Yala, Saiburi, and Narathiwat.³⁶⁶

³⁶³ *Id.*

³⁶⁴ The Freedom to Decide Our Future: Patani People Call for a Peaceful Settlement - Thailand | ReliefWeb, (2019), <https://reliefweb.int/report/thailand/freedom-decide-our-future-patani-people-call-peaceful-settlement> (last visited Apr 17, 2024).

³⁶⁵ IBRAHIM SYUKRI, *supra* note 345 at p. 62.

³⁶⁶ *Id.*



Figure 7: Malay-Muslim provinces in southern Thailand and northern Malaysia.

The 1909 Anglo-Siamese Treaty further exacerbated retaliations by the Patani people. The important provision is found in Article 1 as follows:

The Siamese government transfer to the British government all rights of suzerainty, protection, administration, and control whatsoever which they possess over the states of Kelantan, Terengganu, Kedah, Perlis and adjacent islands. The frontiers of these territories will be determined by the Boundary Protocol annexed hereto.³⁶⁷

The direct implication of Article 1 is that Siam would relinquish its control over the northern Malay states of Kelantan, Terengganu, Kedah, and Perlis. On the other hand, it

³⁶⁷ Anglo-Siamese Treaty 1909, (1909).

also implies Great Britain's approval of Siam's dominance over the Patani people and its region.³⁶⁸

There is a legal question surrounding the validity of Anglo-Siamese Treaty in 1909 after the formation of Malaysia and Thailand as the border of Patani up to the district of Tepha was still intact. This is important to our discussion as BRN claims the territorial area of Patani border until the district of Chepa (currently under Songkhla), which is under the influence of Patani Kingdom until 1909 Anglo-Siam Treaty. According to Ahmad et. al, in accordance with the principles of International Law, it is valid even though there is an absence of explicit consent from the rulers of the states mentioned, as it is grounded in the idea of positivism³⁶⁹. If there is an ambiguity on the legal validity of Anglo-Siamese Treaty of 1909 after Malaya's independence in 1957, the court of ICJ provided a ruling in the case of Nigeria vs. Cameroon which has provided an answer. In this case, Nigeria disputed the validity of its territorial claim to the Calabar region, which was ceded by the British to another European power without the consent of Calabar rulers. The Court, in the determination of boundaries and surrendering of sovereignties, does not differentiate between the status of a patron or colonies.

According to the territorial claim made by BRN in the latest demand for the inclusion of four Malay districts in Songkhla, apart from Pattani, Yala and Narathiwat,³⁷⁰ could the right to self-determination overrule the principle of *uti possidetis juris* under international law? According to Assoc. Prof. Dr. Haniff Ahamat, the four Malay districts of Tepha, Chana, Na Thawi and Sabayoi could not be changed as it is demarcated by the Thai government. However, if such arrangement could be made between both parties, a new legal ruling or a change in the Thai constitution must be made. Despite the unwillingness of the Thai government to merge these four Malay districts into the Patani region, this does not in any way affect the Patani Malay people's right to self-determination.

³⁶⁸ Naeem Hayipiyawong, *THE DEMAND OF POLITICAL RIGHTS: CASE STUDY SPECIAL AUTONOMY REGION STATUS FOR MALAY MUSLIM PATANI IN SOUTHERN THAILAND* (2015).

³⁶⁹ Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, in *THE NATURE OF INTERNATIONAL LAW* 437 (2017) cited in Nizamuddin Alias & Haniff Ahamat, *Sejarah Persempadanan Kelantan-Patani: Kesannya Kepada Evolusi Ketamadunan Islam Dan Politi Melayu Semenanjung: The History of Kelantan-Patani Border Delineation: Its Effects to the Islamic Civilisational Evolution of Malay Peninsula Politics*, 18 JOURNAL OF AL-TAMADDUN 117, 123 (2023). According to Positivism, it denies morality in its justification of action by the State.

³⁷⁰ Thai delegation, BRN hope to clinch peace deal by year-end, <https://www.thaipbsworld.com/thai-delegation-brn-hope-to-clinch-peace-deal-by-year-end/> (last visited Apr 18, 2024).

4.2.3 Common Suffering & Self-Conscious Perception

The Patani people felt the heat of oppression when King Chulalongkorn enforced the *Thesaphiban* system in the Patani region in 1897.³⁷¹ As per previous discussion, to ensure non-political unity of the Patani people, the Patani Kingdom was divided into 7 provinces. The abolishment of Patani Kingdom in 1902 means the end of the sovereign King's rule. Tengku Abdul Kadir was the last Sultan from the Kelantan monarch without an official succession.³⁷² Abdullah observed, with this newly implemented system, the *Khaluang Thesaphiban* or Governal General was appointed directly by the central Thai government.³⁷³ The Governal General administered without proper attention to the local customs and religion of Malay Patani people. Often, the Patani people were downgraded to a lower-class citizen and called 'khek', meaning outsider.³⁷⁴

Due to the abolishment of Patani Kingdom in 1902, as well as the direct appointment of rulers from the Siam-Thai King in Bangkok, the Patani people began mobilising under the leadership of Tengku Mahmud Mahyuddin, the son of Tengku Abdul Kadir, the last King of Patani Sultanate.³⁷⁵ After the end of World War II, an Islamic cleric named Haji Sulong, who was educated in Mecca, sought to acquire political autonomy for the Patani people from the central government of Bangkok.³⁷⁶ He also established the Pattani Nationalist Movement, whereby he stated:

We Malays are conscious that we have been brought under Siamese rule by defeat. The term 'Thai Islam' which we are known by the Siamese government reminds us of this defeat and is therefore not appreciated by us. We therefore beg of the government to honor us with the title of Malay Muslims so that we may be recognized as distinct from Thai by the outside world.³⁷⁷

³⁷¹ Abdullah, *supra* note 35 at p. 105.

³⁷² IBRAHIM SYUKRI, *supra* note 345 at p. 62.

³⁷³ Bunnag and Bunnag, *supra* note 367; Abdullah, *supra* note 35 at p. 105.

³⁷⁴ Abdullah, *supra* note 35 at p. 105.

³⁷⁵ Hayipiyawong, *supra* note 376 at p. 2.

³⁷⁶ *Id* at p. 3.

³⁷⁷ Thanet Aphornsuvan, *Teaching Material: History and Politics of the Muslims in Thailand* 1, 22 (2003); Hayipiyawong, *supra* note 376 at p. 3.

Eligibility Of Patani as A People to Claim the Right of Self-Determination

Through a commission sent by Bangkok, Haji Sulong negotiated as the local representative of the Patani people. On 24th August 1947, Haji Sulong sorted several requests known famously as ‘Seven Demands’ from the Patani people to the central government in Bangkok. The demands are as follows:

1. The appointment of a person with full powers to govern the four provinces of Pattani, Yala, Narathiwat and Satun. This person must have the power to fire, suspend, or replace all local civil servants. This person must be a native of one of the four provinces and must be elected by the inhabitants of the four provinces.
2. 80 per cent of all civil servants in the four provinces must be Muslim.
3. The Malay language must be an official language alongside the Thai language.
4. The teaching in primary schools must be done in Malay.
5. Muslim laws must be recognized and implemented under the aegis of an Islamic court, where the qadhi (Muslim judge) is the assistant, separated from the civil court.
6. All taxes and incomes collected in the four provinces must be used locally.
7. The establishment of a Muslim affairs bureau with full powers to manage Muslim affairs under the authority of the governor mentioned in the first point.³⁷⁸

Worried about the political development in the Patani region, an arrest order was made by the Thailand government for Haji Sulong on 16 January 1948.³⁷⁹ A political movement then rose from the leadership of aristocracy and Patani people, which led to the formation of *Gabungan Melayu Patani Raya* (GAMPAR) – Greater Patani Malay Organisation in 1947-1948. GAMPAR’s manifesto demands a sovereign and free-from-oppression state, self-rule according to the local customs of Islam and the Malay people, and the overall wellbeing of the Patani people to have a secure future.³⁸⁰

After Haji Sulong was captured by the Thai government in 1948, and the death of Tengku Mahmud in 1954, the group splintered into three factions.³⁸¹ The first faction was

³⁷⁸ Chandra, *supra* note 328 at p. 24. Chandra stating that the ‘Seven Demands’ was from Barbara Whittingham-Jones who acquired the copy from Haji Sulong in September 1947. See Barbara Whittingham-Jones, “Pattani-Malay State outside Malaya,” *The Straits Times* (30th October 1947) at p. 8.

³⁷⁹ MAHMUD, *supra* note 339 at p. 77.

³⁸⁰ Minutes about the establishment of GEMPAR, in Tengku Abdul Jalal’s Personal Letter, (1948) cited in MAHMUD, *supra* note 339 at p. 81.

³⁸¹ Hayipiyawong, *supra* note 379 at p. 5.

comprised of aristocracy and Islamic conservatives, namely *Barisan Nasional Pembebasan Patani* (BNPP) – National Front for the Liberation of Patani (NLF) in 1959. The second faction which identified Malay identity as its source of unity and struggles in Patani was named *Barisan Revolusi Nasional* (BRN) – National Revolutionary Front, emerged in 1960. Of all the separatist factions, the third faction, Patani United Liberation Organisation (PULO), was the most active in using violence.

The struggle of Patani people started with GAMPAR movement, demanding total independence after the capture of Haji Sulong. On the other hand, NLF was more focused on creating an autonomous province with the aim of Islamic governance.³⁸² In actuality, The lack of acknowledgment from the government and the Thai majority, as well as the effectiveness of Thai central government's resolution of conflicts that remained to be at odds with the demands of the Patani people, was the root cause of the violence in Southern Thailand.³⁸³ In 2013, after decades of prolonged fighting, a peace dialogue was initiated by representatives from the National Security Council of the Thai government and Barisan Revolusi Nasional (BRN). According to the official documents of the Peace Dialogue Process, which were held in Kuala Lumpur, the wording of the document reads, “We are willing to engage in peace dialogue with people who have different opinions and ideologies from the state” suggests that the central government of Thailand has recognized Patani Malay people as different from their own.³⁸⁴

In 2015, by the initiative of BRN, a Patani Consultative Council (PCC) comprising of a coalition of representatives from six groups such as BIPP, GMIP, BRN and PULO, along with two others, was established³⁸⁵. The PCC or MARA Patani demanded to be recognized as ‘Party B’, who will represent the voice of the people. This was accepted by the Thai government in the negotiation.³⁸⁶ The result from the interviews suggests that both leaders of the Civil Society Organisation (CSO) acknowledged MARA Patani as the representative of Patani people. They were directly linked to the people of Patani as

³⁸² Due-Reh and Paksi, *supra* note 345 at p. 209.

³⁸³ Due-Reh and Paksi, *supra* note 350.

³⁸⁴ General Consensus on Peace Dialogue Process, BANGKOK POST ONLINE NEWSPAPER, Feb. 28, 2013.

³⁸⁵ Due-Reh and Paksi, *supra* note 339.

³⁸⁶ Southern Thailand’s Peace Dialogue: No Traction, REFworld, <https://www.refworld.org/reference/countryrep/icg/2016/en/112341> (last visited May 2, 2024).

suggested from the interviews made with – Mr. Aladee Dengni³⁸⁷ from Yayasan Nusantara, Mr. Hasan Yamadibu³⁸⁸ from Yayasan Bunga Raya, and Muhamad-Ayub Pathan³⁸⁹, a local journalist. The interviewees agreed the Patani people acknowledged the resistance leaders and its movements to claim the right to self-determination, with varying degrees and opinions.

On the other hand, one local academician named Dr Abdulroning Suetair³⁹⁰ disputed BRN's position as the people's representative. Prof. Omar Chapakia³⁹¹ from Fatoni University claims no leader was declared to the public; therefore, it seemed to allude that MARA did not have absolute control on the ground. One participant named Karim; a former leader of government-linked Civil Society Organisation (CSO) from CSCST proposed all civil society organizations be included, in addition to the resistance movement, to all future negotiations with Thai government.

4.3 *Contemporary Anti-Colonial Claim Towards Thailand*

Another important question that needs to be addressed in the contemporary human rights approach for the Patani people to claim the right to self-determination is whether the Patani people are oppressed or if a similar situation has existed or persisted. Therefore, elements of subjugation, domination, or exploitation must be adequately assessed. This thesis will also shed light on whether Thailand had conducted any positive attitude or action to facilitate the right to self-determination towards the Patani people. The critical event started in 1909 when Patani, Yala and Narathiwat were separated from Kelantan by the new boundaries. The British recognized Siam ownership of these provinces in the Anglo-Siamese 1909 Treaty.

The situation was worsened by the enactment of the Compulsory Education Act in 1921. Prince Damrong Rajanubhab, with the assistance of Western teachers, inseminated Thai culture from early education to all citizens of Thailand, including the

³⁸⁷ Dengni, *supra* note 337.

³⁸⁸ Yamadibu, *supra* note 337.

³⁸⁹ Pathan, *supra* note 337.

³⁹⁰ Suetair, *supra* note 337.

³⁹¹ Chapakia, *supra* note 337.

Patani people. This law made it compulsory for all primary school children to learn the Thai language and Buddhist religion for four years.³⁹² Assimilation attempts failed in Patani region as Islamic religious schools called *pondok* or *madrasah* were still the primary form of education for the Patani Malay people to preserve their identity and culture.

In 1932, the new nationalist government led by Phibun Songkram replaced the Siam monarch. A new ruling called Thai Rathaniyom, or the Thai Custom Decree, was enacted in 1939 to solidify his rule. The Patani Malay people were prohibited from practicing Islam and using the Malay language in any official capacity. Towards achieving the Thai-ness policy, Patani Malay people were not given the right to enter government services; there was a mandatory change for their Malay names and districts to the Thai language; traditional Patani Malay costumes were banned; and Buddha statues were erected in every public school in the Patani Malay and Muslim majority region.³⁹³

In the early days of the struggle, on 15th January 1946, Tengku Mahmood, with the other leaders, pleaded to the British to be reunited with the Malay Peninsula. It was ultimately denied by the British to secure a steady supply of food and also because of geopolitical concerns of the United States in Southeast Asia.³⁹⁴ Further escalation occurred in 1948, as the Patani people could not bear the forceful imposition of the Thai Custom Decree of 1939 and the Compulsory Education Act of 1921. Haji Sulong revolted against these policies as well as the indifference of the Thai government towards the 'Seven Demands' by the Patani people to have their right to self-determination.³⁹⁵ The incident broke out in Dusun Nyior village and claimed 400 lives of the Patani people and 30 policemen during the conflict.³⁹⁶

From the 1960's to the 1980's, guerilla war was still waged by the insurgency groups but gradually reduced towards the end of 1980's, after the Thai government

³⁹² Abdullah, *supra* note 35 at p. 106.

³⁹³ *Id* at p. 107.

³⁹⁴ MAHMUD, *supra* note 313.

³⁹⁵ Abdullah, *supra* note 35 at p. 66.

³⁹⁶ James Ockey, *Pattani or Patani: Memory, Forgetting, History, and the Conflict in Southern Thailand*, 62 ASIA PACIFIC VIEWPOINT 179 (2021) at p. 2.

offered an amnesty.³⁹⁷ In 2004, two major events occurred. Insurgents were conducting operations on military bases in the Patani region and afterward sought refuge in the historical old Kruese Mosque. Despite orders from the deputy prime minister to the army to negotiate³⁹⁸, 32 young separatists were killed.³⁹⁹ Another conflict known as Takbai happened in the same year. A huge protest erupted where 78 Patani people's lives were lost. The Thai army shot at the protesters, captured and put them in a truck, where several of them died from suffocation on their way to the Thai military base.⁴⁰⁰

In 2013, talks were held in Kuala Lumpur whereby Malaysia, represented by Datuk Mohammad Thajudeen bin Abdul Wahab from the National Security of Malaysia who acted as a facilitator between the Thai government represented by Lt. Gen. Paradorn Pattanabutra and Ustadz Hasan Taib, a representative of Patani people from the Barisan Revolusi Nasional (BRN). No official documents reiterated the demand of BRN in the closed negotiation talks. However, according to local news, BRN insisted that Thailand recognize the Patani Malay people's culture, religion, and identity. BRN's latest demand is for the Patani people to be given an arrangement for a special administrative region such as Bangkok or Pattaya, according to the Thai constitution.⁴⁰¹ This future special administrative region comprises Patani, Yala, Narathiwat and four Malay districts of Chana, Tepha, Na Thawi and Saba Yoi in Songkhla province.⁴⁰²

4.4 Right to Self-Determination for Patani People Under International Law

4.4.1 Evaluation of Patani as a People

All elements must be fulfilled to determine whether the Patani people could claim the right to self-determination and to what extent it could be claimed under international law. As per Article 1 of ICCPR, all people have the right to self-determination to determine their own way to decide how to live their lives. As discussed in the case of

³⁹⁷ Gerard McDermott, *The 2013 Kuala Lumpur Talks: A Step Forward for Southern Thailand*, PEACE RESEARCH 5, 17 (2014).

³⁹⁸ DUNCAN MCCARGO, *TEARING APART THE LAND: ISLAM AND LEGITIMACY IN SOUTHERN THAILAND* (2009) cited in Ockey, *supra* note 396 at p. 2.

³⁹⁹ Ockey, *supra* note 396 at p. 2.

⁴⁰⁰ *Id.*

⁴⁰¹ BRN pushes for special administration, NATIONTHAILAND (2013), <https://www.nationthailand.com/in-focus/30214994> (last visited Apr 18, 2024).

⁴⁰² Thai delegation, BRN hope to clinch peace deal by year-end, *supra* note 359.

Western Sahara case, and according to Judge Trindade in Kosovo Advisory Opinion case, three elements need to be fulfilled to exercise this right. The first element is that there must be a group of 'people'.

To determine whether it is a 'people' recognized under international law, this thesis will apply the Judge Trindade's *opinio juris* test, which serves as a legal test, as it is also a continuation of Scharf's two-pronged test, which is an objective one. It is based on similar characteristics and subjective consciousness, and a group test is a proper evaluation. Kosovo's case was put under another criterion, which was a territorial connection to the people. Based on the evaluation of the Patani people, they are both minorities and an Indigenous group of people. However, to pass the legal test as a 'people,' their connection to the land was an essential feature only available to an Indigenous group. Therefore, the Kosovo three criterion would be our approach for this case.

The first element is that the people must share a common background of ethnicity, language, religion, history and cultural heritage. Patani people are Malay Indigenous people who originated and lived in the Patani Kingdom from the 15th century until its conquest in 1785 and formal abolishment by Siamese Kingdom in 1902. Since then, the Patani people have lived as a minority in Southern Thailand. The Patani Malay people can be traced to one of the oldest Malay Kingdoms of Langkasuka since 1st AD. They use the Patani Malay dialect, which has similarities with the Kelantan dialect. Their religion is Sunni Islam, and they practice the Shafie school of thought.⁴⁰³

Second, "the territorial integrity of the area claimed" of the Patani people was established by their strong connection with the old Patani Kingdom. The area stretches from the city of Tepha (Tiba) in Songkhla province to the north border of the old Kingdom before the rearrangement in 1902. To the south is the Golok River bordering Kelantan, a state in northeast Malaysia in the official recognition in the Anglo-Siamese Treaty in 1909. However, as Tepha is situated in Songkhla province, it may not be possible to integrate with the Patani region as it is against the rule of *uti possidetis juris*. However, referring to the case of the UK Supreme Court, *Reference by the Lord Advocate of*

⁴⁰³ Abdullah, *supra* note 35 at p. 104.

devolution issues, the Court decided that “there is a strong presumption in favor of the interpretation of domestic legislation in a manner which is compatible with international law.”⁴⁰⁴

The Court refers to Article 1 of the UN Charter, Resolution 1514, Covenants of ICCPR and ICESCR. Furthermore, the Court further cited the case of *Reference re Secession of Quebec* whereby the principle of self-determination was carefully observed, and Canada gave equality to the people of Quebec. Whereas in this case, the Patani people were “denied meaningful access to government to pursue their political, economic, social and cultural development”.⁴⁰⁵ As per Quebec’s case, “the state which does not respect the principle of self-determination is not entitled to maintain its territorial integrity”.⁴⁰⁶ Therefore, the Patani people have the right to demand an external form of self-determination, including four regions in the Songkhla province, to be included in the territory in exercising this right, with the amendment of legislation by the Thai Kingdom in current and future negotiations.

Third, in relation to the ‘self-conscious perception as a people’ as well as the ability to form a political entity, the Patani people have persistently struggled for independence from the Siamese Kingdom since 1785. After World War 2, when the Japanese left, the region was reconnected with the northern Malay states when they were returned to the Thai government. The liberation movement, as a political liberation entity, was established by Haji Sulong in 1948 in the name of GEMPAR to request the central government of Bangkok to fulfill the ‘Seven Demands’ of the people of Patani, such as the right of autonomy, the right to govern themselves to protect their identity, language, religion and culture. After decades of struggle, during the General Consensus on Peace Dialogue Process⁴⁰⁷, the Government of Thailand accepted the Patani people as a different from the Thai majority people in Thailand. The liberation movement, previously represented by BRN in 2013, represented the Patani people in negotiating with the Thai central government. Along with other groups in 2015, they formed the Patani

⁴⁰⁴ Lord Reed et al., *REFERENCE by the Lord Advocate of Devolution Issues under Paragraph 34 of Schedule 6 to the Scotland Act 1998* at para 85 at p. 30.

⁴⁰⁵ *Reference re Secession of Quebec*, *supra* note 222 at para 138.

⁴⁰⁶ *Id* at para 145.

⁴⁰⁷ General Consensus on Peace Dialogue Process, *supra* note 372.

Consultative Council or MARA Patani which comprises representatives from all polity groups in the Patani region.⁴⁰⁸

In conclusion, based on Judge Trindade's criteria in Kosovo's case, the Patani people have demonstrated similar characteristics of ancestry identity from the old Malay Langkasuka kingdom – they use the Malay language with Yawi dialect, practice Sunni Islam and adhere to the Shafie school of thought, and possess strong land connections with Patani regions of Yala, Narathiwat and four districts of Songkhla province. From the time of Siamese conquest in 1785, formal annexation in 1909, until the current situation and negotiation with Thailand in 2013, the Patani people have maintained self-consciousness as a distinct people. In 2015, a Consultative Council named MARA Patani was formed as a political movement. Therefore, the Patani people are an indigenous people of the land, as well as a minority group under international law.

4.4.2 Patani as a Colonial or Oppressed People

The second part of the question is whether Patani is a colonial people. This thesis refers to UNGA Resolution 1541, which states that a colonial territory must be geographically separated, by an ocean. The people must be ethnically different from the colonial power.

To argue that Patani is a colonial territory of the Siamese Kingdom under the conventional 'salt-water' test under Resolution 1541 is incorrect. The Patani Kingdom was interconnected with Siam-Thai through a land route from the northeast coast of the Malay peninsula throughout the strait of Kra Isthmus with the Siam-Thai Kingdom. It is true, that the Patani people are culturally and linguistically different from the Thai people. Patani could not be considered a colonial territory under international law due to the geographical elements not being fulfilled, that is, the colonial territory must be separated by water. To conclude, Patani could not be a colonial people under international law.

⁴⁰⁸ Due-Reh and Paksi, *supra* note 393 at p. 211.

Therefore, the following question of the thesis is whether Patani people as Indigenous people and Minorities could exercise the right to self-determination and to what extent they can do so.

An important provision of Resolution 2625 which says. “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.” This right extends to all people including Indigenous people and Minorities. According to the UN Indigenous Study and UN Working Group definition of Indigenous people, the important element is that the preservation of identity from their ancestry exists with their strong attachment and history to the land. As per Minorities, although there is no specific definition, they are a non-dominant group in a state. As discussed previously, the Patani people have lived around Pattani, Yala & Narathiwat, and four provinces in Songkhla since old age. They have had a strong attachment to the land of Langkasuka and Patani Kingdom since the first century. They are also numerically smaller than Thai people in Thailand. Even though Patani people are not colonial people; they have the right to exercise their right to self-determination.

The next question is whether Thailand should give this right towards Patani people. This thesis refers to Article 1 (3) of the ICCPR⁴⁰⁹, “The State parties to the present Covenant... shall promote the realization of the right of self-determination.” Contemporary colonial experience, such as oppression or domination, may be established under Article 1 (3) of ICCPR for the State to act upon the duty obliged to it by the United Nations. Article 2(4) of the UN Charter extends this prohibition to refrain from intervention toward all people, including minorities and Indigenous people. Thailand, a party to the Covenant under Article 55 and Article 56, must guarantee peaceful relations and mutual respect towards the Patani people. Under the Western Sahara’s case, the wishes of the Indigenous people must be respected in terms of deciding their right to self-determination.

⁴⁰⁹ International Covenant on Civil and Political Rights, *supra* note 27.

This thesis employs the contemporary human rights approach in interpreting Article 2 (4) and Article 55 of the UN Charter⁴¹⁰ in conjunction with Article 1 of the Covenants.⁴¹¹ Furthermore, under Resolution 2625, generally, the right to self-determination only affords internal right to self-determination, which does not go beyond territorial claim and sovereign political structure. The provision stated that “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”.⁴¹² However territorial integrity or political unity could not be overruled “when conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

Furthermore, according to Article 1 of the ICCPR in conjunction with Article 19, Article 22, as well as Article 25a, if other parts of the Covenants were breached, then it can be said that a breach of Article 1 has occurred. Therefore, the derogation clause under Article 4 (1) of the Covenants, which allows the State to impose measures in times of emergency, would not be allowed if it is “inconsistent with other obligations under international law.”⁴¹³ The Kosovo Advisory Opinion case mentions where a situation of oppression exists, the right could be extended to secession. This is supported by the case of East Pakistan, whereby the element of continuous discrimination by Pakistan was established.

Article 1 of ICCPR, in conjunction with the right of freedom of expression under Article 19, the right of peaceful assembly under Article 21, and the right to freedom of association under Article 22 were all obligated upon Thailand towards the Patani people. As the UN Human Rights Committee commented, Thailand instead does the opposite i.e., it commits negative instead of positive action, which is the opposite of what is demanded by Article 1 of the Covenants. If Thailand submits that all rights above occurred in the time of

⁴¹⁰ U.N. Charter Art. 2(4) and Art. 55, *supra* note 72.

⁴¹¹ Article 1 of International Covenant on Civil and Political Rights, *supra* note 27 and International Covenant on Economic, Social and Cultural Rights, *supra* note 28.

⁴¹² G.A Res. 2625 (XXV), UN. Doc. A/RES/2625 (Oct. 24, 1970), *supra* note 135 at p. 124.

⁴¹³ Article 4 (1) of the International Covenant on Civil and Political Rights, *supra* note 27 and International Covenant on Economic, Social and Cultural Rights, *supra* note 28.

Eligibility Of Patani as A People to Claim the Right of Self-Determination

emergency, all past and current actions are consistent with discrimination against the Patani people. Unequal rights towards Patani people, segregation, and oppression of their rights to practice their religion, language, and culture were in evidence.

Proof of evidence suggests oppression has occurred because of the State's negative action of Thai government towards the Patani people since 1902, previously of the Siamese Kingdom and Thai government in the present situation. Despite believing that Patani Malays are different from other Thai minorities, the Thai Government assumes that Patani people can be converted with laws and rules imposed on them, as with other Thai minority people. Patani people have been demanding their right to self-determination under peaceful and diplomatic means since 1948. Since 1948, the Government of Thailand has failed to facilitate its 'positive duty' under Article 55 and 56 of the UN Charter to assist the Patani people in acquiring their right to self-determination. The 'Seven Demands' by Haji Sulong were dismissed without being given a chance for formal consultation in the parliament.⁴¹⁴ Later, in the same year, Phibun Songgram, Thailand's Minister of Defense's act of sending a Malay officer to negotiate with the leader, the son of the last Raja, Tengku Mahmud, deemed insufficient. The proposal by Tengku Mahmud was dismissed because Siam did not want an external party interfering with the Siamese sovereignty.⁴¹⁵

As per findings above mentioned⁴¹⁶, misconduct and human rights violations occurred. Improper methods of accountability towards the Patani people, especially in the Takbai incident in 2004 when 78 protesters died. Despite negotiations of Patani people representative, PICC or MARA with Thailand government are ongoing, three Special Laws⁴¹⁷ are still operating in the Patani region. These laws enable Thai authorities to arrest people without proper procedures and ensure the continuing presence of military checkpoints around the area⁴¹⁸. Therefore, based on the element of continuous regular discrimination, there was an intention by the Thai government to continuously

⁴¹⁴ MAHMUD, *supra* note 339 at p. 77.

⁴¹⁵ *Id* at p. 99.

⁴¹⁶ The Freedom to Decide Our Future, *supra* note 376 at p. 15.

⁴¹⁷ Relevant section is Section 14 & 15 of the Martial Law, B.E. 2457 (1914) cited in The Freedom to Decide Our Future, *supra* note 378 at p. 21.

⁴¹⁸ "The people interviewed observed that soldiers insert themselves within Tadika/Sekolah Melayu and commented on how this was inappropriate as it creates a tense atmosphere for the children." Cited in The Freedom to Decide Our Future, *supra* note 376 at p. 22.

discriminate against the Patani people, subjugating them to assimilate into the Thai culture using forceful methods in the 100 years after the abolishment of the Patani Sultanate in 1902.

In the current situation, the Thai Government only considered looking at their demands to negotiate with BRN in 2013 and the representative of resistance groups, 'MARA in 2015 when a third party, Malaysia intervened in the conflict. Malaysia interceded to become a mediator, to bring peaceful solutions to the ASEAN region as well as the stability of its northeastern border of Kelantan, where the Patani people are situated. Current situations suggest that the negotiation has come to a stalemate, as the Thai government categorically opposed any type of exercising the right of political self-determination that would have compromised the state's sovereignty. On another hand, the leaders of the Patani people were increasingly having difficulties maintaining order on the ground, as negotiations appeared to be unresolved.⁴¹⁹

In conclusion, the said act by Thailand in times of emergency does not absolve its duties to respect the right of social, cultural, and economic development to the Patani people as Indigenous and Minority people in Thailand under international law. In place of this, Patani people do have the legitimacy to enjoy their right to self-determination, including having an autonomous region or self-government compatible with the Thailand constitution. Current situations suggest Thailand government does allow practicing the religion of Islam and the teaching of the Yawi language in schools. However, Thailand persistently refuses other forms or rights of self-determination especially the political right in terms of identity and preservation of culture. Discrimination continuously occurs in the Malay Patani region; it could be suggested that an element of oppression exists towards the Patani people by the Thailand government.

⁴¹⁹ Due-Reh and Paksi, *supra* note 339 at p. 212.

Chapter 5: **CONCLUSION**

This thesis observes that the principle of self-determination has evolved from a moral to a political and then a legal one. President Woodrow Wilson significantly contributed to the idea of self-determination. The population or people, based on shared and mutual characteristics such as language, culture and tradition, build a nation to achieve peace. President Vladimir Lenin, on the other hand, focused on the right to self-determination with anti-colonial elements in situations where the colonial powers imposed their rules and ideas upon others, especially the ethnic minorities and Indigenous peoples.

The principle of self-determination is significant and is demonstrated in its inclusion during the formative years of the United Nations in 1945. There are two implications available in the Charter. First, the nations acknowledged that every state is equal in stature. Therefore, another state is prohibited from intervening in any matters pertaining to their exercise of self-determination. Second, the people have the right to govern according to their own choice. However, it must be done according to the wishes of the whole population.

The principle of self-determination later developed into a legal right proper in Resolution 1514, which ties to the idea of independence from colonial powers. Resolution 1541 further restricted this interpretation to colonial territories separated by an ocean and culturally different from the colonial master. Resolution 2625 further strengthens people's right to self-determination as it has been recognized as customary. The International Court of Justice, in its interpretation of Resolution 2625 and the right to self-determination, submitted that the right to self-determination is available for all people, not only those confined within the colonial aspect. This interpretation, however, does not encourage secession. Nonetheless, the people have the right to do so if the population is not adequately represented. The Case of Western Sahara affirms the rights of indigenous people and the need for consultation with the representatives of the people. The case of Kosovo challenges the 'salt-water' colonial test, further discusses how far the extension of the right of self-determination could go, whereby declaration of independence is one of the results of respecting the wishes of the people.

Conclusion

This thesis delves into the definition of a people under international law. The common characteristics of a people are based on similar language, tradition, religion as well as facial features. The three elements test, comprising the identities, the area they belong to, and conscious self-perception as a people has been identified. Two non-dominant groups of people that have been identified in this thesis are indigenous people and minorities. For the indigenous people qualification, the Patani people has fulfilled the said definition. The Patani people also qualify as minorities, as they do constitute non-dominant majority in Thailand as per the definition of a minorities people under international law. Minorities cannot claim the political right to self-determination unless it can be established that the minorities have territorial connection with the area and perception as a politically distinct unit. However, the trend has moved towards the human rights approach test. If a minority or colonial people could not preserve their identities with the majority people in a state, they have the right to remedy their situation.

Patani is a Malay Sultanate dating back to the old Langkasuka Kingdom. The Kingdom flourished from the 15th century to the end of the 19th century. It was conquered by the Siamese in 1785 and formally annexed by the 1909 Anglo-Siamese Treaty. The Patani people speak the Malay language with Patani dialect. The language is taught in local schools and *madrassahs* in Jawi (Arabic script). They practice Sunni Islam and retain the cultures and traditions of their forefathers. Patani people are territorially linked to the areas of Patani, Yala, Narathiwat and four districts of Chana, Na Thawi, Tepha and Saba Yoi of Songkhla. After failing to merge with Malaysia in 1957, there has been ongoing resistance until today. Negotiation attempt was made by the Thai government in 2013 with the BRN. In 2015, a Patani Consultative Council called MARA was recognized as the political representative of the Patani people. Therefore, the three elements needed to be recognized as a people were fulfilled. This study suggests that the Patani people are indigenous to the region and a minority in Thailand.

This study also found reluctance to take positive action by the Thai government required by the international law to assist the Patani people in their demand for the right to self-determination. The ongoing negotiation resulting from initiative by Malaysia to be a mediator in the negotiation for peace and reconciliation between the resistance group and Thai government. The negotiation process has been ongoing for 10 years to ease the

Conclusion

tension in the southern borders. The Patani people may not be a colonial people in the strictest sense. According to international law, the fact that the Siamese Kingdom and the Patani Sultanate were not separated by an ocean, suggests that they could not be considered as colonial territory. Currently, martial law is still in operation, and the Thai armies are in control throughout the region. The minorities right were still not afforded, and Patani people could be captured if suspected by the military. Therefore, it could be said that the Patani people have experienced continuous discrimination since 1948.

Among the issues not thoroughly investigated is the conflict between the right to self-determination and the *principle of uti possidetis juris*. In this case, if the four Malay districts in Songkhla are allowed to exercise their right, would they be allowed to be included in the possible Patani Autonomous Region? This study believes that it is not possible. Therefore, a future study could be conducted on the constitutional process of achieving this if the four districts of the Malay people in Patani choose to do so, examining whether a constitutional remedy could be implemented to accommodate political self-determination in those regions.

This thesis suggests further study on how self-determination should be exercised and presented to the Patani people in a referendum, whether it would be an integration with Thailand, free association in which powers are delegated to the UN with Malaysia's assistance or total independence from Thailand. The current negotiation between the Thai government and the representatives of Patani people suggests that a free autonomous region would be a win-win situation for both sides in the conflict. Thailand is a unitary state government, distinct from a federal system, which provides flexibility in the administration of an individual state or district. Therefore, there is also a need to study the type of autonomy that would suit the needs of the Patani people to ensure the preservation of their language, culture and religion.

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INTERVIEWS

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Appendix A

RIGHT TO SELF-DETERMINATION FOR PATANI PEOPLE REGARDING ETHNICITY AND TERRITORIAL AREA

Name: Prof. Dr. Haniff Ahamat

Affiliation: National University of Malaysia

Date: 4/3/2023

To determine if a people are eligible to claim the right to self-determination, the people themselves must fulfill the criteria to claim such right. In the case of Kosovo, Judge Trindade agrees that the Kosovars met the criteria of a people as follows: (a) sharing of a common background of ethnicity, language, religion, history and cultural heritage; (b) territorial integrity of the area claimed; (c) the subjective element of the group's self-conscious perception as a distinct "people".

In "Tuntutan 7 Perkara (Seven Demands)" by Haji Sulung during the early years of resistance, he claimed that the area includes four districts of Malay-speaking people in Songkhla (Singgora). In the latest information from the Peace Talks negotiation, BRN, the representative of the Patani Malays, demanded that the Thai government recognizes the existence and supreme power of the administration of Patani Malays in the Patani territory. The BRN has reasoned that the root of the conflict stems from the occupation of Patani Malays and that it demands self-determination. This also includes the four districts in the Songkhla province.

First question: Can Satun (Setul) province, which speaks different dialect (Kedahan), be regarded as part of the Patani people?

Answer: Setul people are of Malay descent, speak a different Malay dialect, and adopted the Siamese language as their first language. So, they are not regarded as Patani people.

The second question: Pertaining to the second criterion, which is the territorial integrity of the area claimed. BRN wants to claim part of the Songkhla province: Thepa, Chana,

Appendix A

Na Thawi and Sabayoi. According to International Law, could such a demand overrule the demarcation line made by the central government of Thailand (*uti possidetis juris*) to claim the right to self-determination?

Answer: Under international law such demand cannot overrule the demarcation line made by the central Thai government based on *uti possidetis*, unless a treaty reverses the demarcation. However, that international law position does not affect the right to self-determination.



Appendix B

PATANI PEOPLE REGARDING SELF-CONCIOUS PERCEPTION & COMMON SUFFERING

Name	Affiliation
Hassan Taib	Former Spokesperson of BRN Negotiation in 2013
Aladee Dengni	Former President of Civil Society Assembly for Peace (CAP)
Hasan Yamadibu	Bunga Raya Foundation
Abdul Kareem Asmaae	Former Civil Society of Southernmost Thailand (CCST)
Dr. Abdul Roning Suetair	Prince of Songkhla University (PSU)
Prof. Dr. Omar Chapakia	Fatoni University
Muhamad-Ayub Pathan	Journalist

Questions:

- 1) Who do you think Patani people are? Does Satun part of the Patani people?
- 2) What constitutes the territorial area of the Patani people?
- 3) What have been the grievances of the Patani people since the abolishment of Patani Sultanate in 1902?
- 4) Do Patani people agree with BRN as the representative of Patani people in its struggles?
- 5) What is the end goal of the negotiation with the Thailand government?
- 6) The policy of Thai government towards Patani people?