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James L. Crawford

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## THE CONTINUED PERSECUTION OF THE KURDISH PEOPLE IN TURKEY

James L. Crawford\*

*Kurds have no friends but the mountains.*

— Kurdish Proverb<sup>1</sup>

### *Introduction*

On September 13, 2007, the General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by an overwhelming majority.<sup>2</sup> The UNDRIP was a product of over two decades of negotiations.<sup>3</sup> In response to the Assembly's adoption of the UNDRIP, Les Malezer, a Chairperson of the Global Indigenous Caucus, asserted that "the United Nations and indigenous people had found common ground" by enshrining rights that were already approved by the United Nations system but denied to indigenous people.<sup>4</sup>

While there was a significant consensus on the declaration's provisions, some countries, including the United States, expressed "concerns over provisions on self-determination" and the possibility they might be construed as giving indigenous peoples rights to "veto national legislation and State management of resources."<sup>5</sup> Expanding and clarifying the definition of indigenous people under the UNDRIP to include the Kurdish people will provide clear rights recognized by the greater international community, helping the Kurdish people to maintain their culture and heritage in the face of persecution.

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\* Third-year student, University of Oklahoma College of Law.

1. Quoted in Chikara Hashimoto & Egemen B. Bezci, *Do the Kurds Have 'No Friends but the Mountains'? Turkey's Secret War Against Communists, Soviets and the Kurds*, 52 MIDDLE E. STUD. 640, 640 (2016).

2. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007) [hereinafter Press Release, GA Adopts UNDRIP], <https://www.un.org/press/en/2007/ga10612.doc.htm> ("By a vote of 143 in favour to 4 against (Australia, Canada, New Zealand and the United States), with 11 abstentions, the Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples.").

3. *Id.*

4. *Id.*

5. *Id.*

The subject of the independence of the Kurdish people in the Middle East is one which has been at the forefront of my mind for nearly two decades. I spent over fifteen years in the United States Marine Corps before retiring in 2018. During my time in the military, I served as both an infantryman and an intelligence specialist. Over the course of my career, I deployed to the Middle East a total of three times with nearly two years spent living with, interacting with, training, and, at times, fighting against the many cultural and ethnic groups that make up this diverse region of the world.



Figure 1 (James Crawford and Two Iraqi Soldiers, c. 2007)

I trained and taught our allies to not only improve in their ability to protect themselves and their land from our common enemies, but I also managed and conducted their troops in a way that would garner their respect and loyalty. During my second deployment, I was embedded with an Iraqi infantry battalion. During this time, I lived among Iraqi soldiers, including Iraqi Kurds. In doing so, I interacted with them on a personal level, heard their stories, learned about their families, ideals, and opinions of the then-current political atmosphere.

During my third deployment to the Middle East, I split time between Bahrain, the United Arab Emirates, and Jordan, where I again lived and worked with members of these countries' military for an extended period. This time afforded me a unique opportunity to immerse myself within the cultures of these countries and gain insights not possible any other way.

The history of the Kurdish people in the entire Middle East is riddled with violence and rebellion, mistreatment and suffering, and neglect and uprising. In Part I, this Comment introduces the background and history of the Kurdish people. Then, in Part II, this Comment examines Turkey's State of Emergency Declaration, and the United Nations reports on subsequent

human rights violations. Part III explores Turkey's domestic law regarding the Kurdish people. Part IV discusses the Turkish Judiciary's role in Kurdish repression. Part V details the UNDRIP and ambiguities of who qualifies as indigenous peoples. Finally, this Comment analyzes the legal status of the UNDRIP in Part VI. This Comment not only sheds light on some of the history of the Kurdish people, but also discusses how the governments they pledge allegiance to have continually sought assimilation of the Kurdish people by seeking to remove their culture, language, identity, and basic human rights.

### *I. Background/History*

#### *A. Kurdish People: Origin and Historical Issues Up to World War I*

The Kurdish people are a storied group with a long history of marginalization and subjugation. "It is a sad feature of the Kurdish question that the only times it is brought to our notice is at moments of conflict."<sup>6</sup> For at least the last 3,000 years, the Kurdish people have occupied the mountainous regions that comprise portions of modern-day Turkey, Syria, Iraq, and Iran.<sup>7</sup> Historically, the Kurdish people consisted of independent nomadic tribes known for their abilities to survive through numerous difficulties, including the onslaughts of conquering armies marching across the Anatolia and Mesopotamia regions.<sup>8</sup>



Figure 2 (Encyclopedia Britannica, 2018)

6. David McDowall, *The Kurdish Question: A Historical Review*, in *THE KURDS: A CONTEMPORARY OVERVIEW* 8, 8 (Philip Kreyenbroek & Stefan Sperl eds., 1992).

7. Edgar O'Ballance, *THE KURDISH STRUGGLE 1920-94*, at 1 (1996).

8. *Id.*

The first time the Kurdish people are seen in history is in 400 B.C. during their retreat to the Black Sea where they attacked the Xenophon's Ten Thousand.<sup>9</sup> In the seventh century, Islamic armies advanced through the region, "forcibly convert[ing]" the Kurdish people to Islam.<sup>10</sup> Arabs were among the first to refer to this group of people as "Kurds," which was derived from the word "Kardu."<sup>11</sup> This word refers to the mountains in the region.<sup>12</sup> Whole populations of tribes were eliminated, as Mongols and Turkomans invaded Kurdish lands.<sup>13</sup>

Loyalty to a tribe generally stemmed from a mixture of kinship to tribe members and the territory in which the tribe was settled but was not commonly based on one or the other.<sup>14</sup> It is difficult to measure loyalty among the Kurdish people as their relations were rife with conflict; strong leaders gained loyalty and support just to overthrow other tribal leaders or to join with the ruling government of the time.<sup>15</sup> Tribal leaders were even willing to control surrounding tribes on behalf of the government if the reward was high enough.<sup>16</sup> This relative balance between the government and tribes was maintained for centuries as long as the government did not disturb the Kurdish territories and, in turn, the Kurdish people did not disturb the government.<sup>17</sup>

Upon the final withdrawal of the Mongols, the Ottoman Turks made their way into the region and clashed with the Persians, who sought control of Anatolia and Mesopotamia.<sup>18</sup> By the time of the Crusades, the Kurdish people built a reputation of military effectiveness by fighting against those who interfered with them and in their military service to the regimes in which they were subject.<sup>19</sup> The thirteenth and fourteenth centuries brought a

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9. McDowall, *supra* note 6.

10. O'Ballance, *supra* note 7.

11. McDowall, *supra* note 6.

12. O'Ballance, *supra* note 7.

13. *Id.*

14. McDowall, *supra* note 6, at 9.

15. *Id.* at 9–10.

16. *Id.* at 10 ("As recently as the 1950s, when asked by a British diplomat what he would do about a Kurdish tribe that was in revolt, the Iraqi Prime Minister Nuri al-Said replied, 'Oh, it's quite simple, I shall send a bag of gold to a neighbouring chief.'"). This lack of true loyalty to their own tribesman and culture played a significant part in hindering their efforts to unify and promulgate an independent Kurdish state.

17. *See id.* at 10.

18. O'Ballance, *supra* note 7.

19. McDowall, *supra* note 6.

time of expansion for the Kurdish people as they began to extend their territory northward through battle.<sup>20</sup> During the Battle of Chaldiran in 1514, both the Persians and the Turks sought to stabilize the bordering territory with Kurdish cooperation.<sup>21</sup>

Following the Battle of Chaldiran in 1514, the Kurdish people aided the Ottomans in defeating the Persian Empire in the region.<sup>22</sup> The Ottomans gifted the Kurdish commanders land and titles both to encourage their loyalty and in anticipation of their assistance in driving the Persians further east.<sup>23</sup> In accepting these titles and lands, the Kurdish people became loosely tied to the Ottoman government.<sup>24</sup> This tie created a divide in the Kurdish people connected to the Ottoman Empire and the Kurdish people still under Persian rule.<sup>25</sup>

This Kurdish-Ottoman agreement was convenient and economical for both sides since the Kurdish people were left in relative peace and their respective governments were left with secure borders.<sup>26</sup> Despite occasional interreligious squabbles, this period of time saw a diminished level of friction between the Kurdish people, who followed the Sunni sect of Islam, and the Persians, who followed the Shia sect of Islam.<sup>27</sup> In 1639, an area of land where the Mesopotamian Plain and the Persian Plateau met was demarcated in the Treaty of Zohab.<sup>28</sup> This area encompassed the territory inhabited by the Kurdish people.<sup>29</sup> The seventeenth and eighteenth centuries saw little effort by either the Turks or the Persian Empire to “pacify their Kurds” as efforts were made to expand their empires elsewhere.<sup>30</sup> This neglect by both governments resulted in an unstable “lawless tribal no man’s land.”<sup>31</sup>

In the beginning of the nineteenth century, both Turkey and Persia entered into conflict and eventually war with Russia.<sup>32</sup> During this time, the

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20. *Id.* at 11.

21. *Id.*

22. O’Ballance, *supra* note 7, at 1–2.

23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. McDowall, *supra* note 6, at 11.

27. O’Ballance, *supra* note 7, at 3.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 6.

Turkish government took back complete control of the eastern border.<sup>33</sup> With similar decisions being made on the other side of the border by the Persian government, instability within the region grew as the Kurdish people were again unable to govern themselves.<sup>34</sup> The Turkish and Persian governments were unable to spend time or resources on the Kurdish territories until the latter half of the century, resulting in further instability in the region and leaving the region vulnerable to Russian conquest.<sup>35</sup> As a consequence of the continued Turkish and Persian power exertion, the Kurdish people attempted multiple revolutions.<sup>36</sup> And while some of the tribes fought for complete independence, others simply wished to maintain the level of relative freedom they experienced during the centuries prior.<sup>37</sup>

In 1878, the Persians strengthened their border defense and replaced Kurdish governors with a more direct Persian administration.<sup>38</sup> Naturally, this brought dissatisfaction among the Kurdish people, who were unhappy with the deprivation of authoritative positions within the Persian government.<sup>39</sup> As Russian troops fought the Turks, the Russians sought support from disenfranchised Kurdish tribes.<sup>40</sup> In 1877, some Kurdish tribes joined the Russians as they fought in the eastern Anatolia area in a short-lived rebellion.<sup>41</sup>

After the Russians persuaded some Kurdish tribes to join their fight, cooperation amongst tribes grew difficult and rivalries among the Kurdish people grew.<sup>42</sup> The resulting leadership void was filled by religious personalities, as religious figures become the primary leaders of the tribes.<sup>43</sup> One of the better-known religious leaders, Sheikh Ubeidullah of the Nakshbandi order, was among the first to suggest the Kurdish people be autonomous rather than ruled by two separate governments.<sup>44</sup> In 1880, Ubeidullah gathered support from Kurds on both sides of the line—Ottoman ruled and Persian ruled—and pushed east into Persian territory

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33. McDowall, *supra* note 6, at 11.

34. *Id.*

35. O'Ballance, *supra* note 7, at 6–7.

36. McDowall, *supra* note 6, at 11.

37. *Id.*

38. O'Ballance, *supra* note 7, at 7.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

with the intent of “pushing [out] Persian security forces” and establishing a “Kurdish Autonomous State,” pledging allegiance to Turkey.<sup>45</sup>

While the Turkish government originally supported the idea of an autonomous Kurdish territory, it quickly backtracked after considering the consequences of an autonomous Kurdish territory on its volatile eastern border.<sup>46</sup> This withdrawal of support from the Turkish government, as well as the loss of support from Kurdish tribesman, resulted in the first of many recorded unsuccessful attempts in securing an autonomous Kurdish state.<sup>47</sup> Even so, many of the tribal governors were uncomfortable with the idea of becoming an autonomous nation as it could have a negative impact on their accustomed status and power as Sunni Muslim subjects of an Islamic Empire.<sup>48</sup>

In 1907, Persia was divided into two separate areas of influence: the north was taken by the Russians and the south by the British.<sup>49</sup> Weak government caused instability within the northern region, occupied by the Kurdish people, allowing Turkish troops to enter in 1908.<sup>50</sup> In 1911, the Tehran government sent a militarized police force to the area in efforts to control the unrest.<sup>51</sup> However, this effort was unsuccessful and gave way to a Russian invasion in portions of the territory later that year.<sup>52</sup>

In 1908, the Turkish government was overthrown by the Young Turks with the promise of reform and representation of all people in the Ottoman Empire.<sup>53</sup> With this change in power and political ideals, the Kurdish nationals were able to form several political clubs with the goal of reaching other Kurdish people.<sup>54</sup> However, the clubs were unsuccessful in reaching their fellow tribesman as the Turkish government saw these clubs as a threat and subsequently interfered in their efforts.<sup>55</sup>

World War I began in August 1914 where the Allies fought the Central Powers.<sup>56</sup> The Kurdish people and the Ottoman Empire fought alongside

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45. *Id.* at 7–8.

46. *Id.* at 8.

47. *See id.*

48. *Id.*

49. O’Ballance, *supra* note 7, at 9.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 10.

the Central Powers beginning in October of the same year.<sup>57</sup> Armenian irregulars soon advanced into Turkey followed by the Russians.<sup>58</sup> The resulting occupation led to a large-scale genocide of nearly 600,000 Kurdish people.<sup>59</sup> The Armenians killed and looted as they pushed forward into Ottoman territory until they were routed by Turkish troops.<sup>60</sup> This vicious attack on the Kurdish population would be avenged as the Turkish government launched its own genocide campaign against the Armenians and then relocated the remaining Kurdish people into their de-populated villages.<sup>61</sup>

In 1917, the Russian Revolution took place.<sup>62</sup> During this revolution, Russian troops shot their officers and attempted to return home, procuring abandoned weapons and ammunition which fostered further instability within the Kurdish region.<sup>63</sup>

#### *B. Current Issues (Post-World War I)*

Today, the Kurdish people are one of the largest ethnic groups without a state.<sup>64</sup> In fact, Kurdish people are the fourth-largest ethnic group in the Middle East and still inhabit their historical lands.<sup>65</sup> Arguably, the modern drive for Kurdish independence began with the fall of the Ottoman Empire.<sup>66</sup> In the aftermath of World War I, President Woodrow Wilson produced a Fourteen-Point Program for World Peace, stating that “non-Turkish minorities of the Ottoman Empire should be assured of an absolute, unmolested opportunity for autonomous development.”<sup>67</sup> However, the Kurdish people lacked unity as a group, leaving them unable to take advantage of the situation to demand a state of their own.<sup>68</sup>

Instead, the Allies and the forming Turkish government ratified the Treaty of Sèvres, which established an Armenian state and left the Kurdish

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 11.

63. *Id.*

64. *The Time of the Kurds*, COUNCIL ON FOREIGN RELS. (Oct. 4, 2017), [https://www.cfr.org/interactives/time-kurds#!/?cid=soc-at-the\\_time\\_of\\_the\\_kurds-infoguide](https://www.cfr.org/interactives/time-kurds#!/?cid=soc-at-the_time_of_the_kurds-infoguide).

65. *Id.*

66. *Id.*

67. O’Ballance, *supra* note 7, at 12.

68. *Id.* at 13.

people without a state.<sup>69</sup> In anticipation of potential conflicts between the newly established Armenian state and the Kurdish people, the two groups prepared a memorandum to allow for the establishment of a Kurdish state if the Kurdish people made a formal request to the League of Nations.<sup>70</sup> This memorandum was included in the Treaty of Sèvres and the Turkish government agreed to its provisions in 1920.<sup>71</sup>

The hopes for an independent Kurdish state, however, were quickly halted when Turkish General, Mustafa Kemal, led a revolt against the Treaty of Sèvres.<sup>72</sup> Mustafa Kemal “repudiated his government’s submission at Sèvres, raised the flag of revolt in the name of the Muslims of Anatolia, and drove out the Christian forces in the west (Greece) and the east (Armenians and Soviets).”<sup>73</sup> Concerned with a growing threat from the USSR, “[n]one of the Allies were prepared to enforce any of the Treaty of

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69. *Id.* After WWI, the Armenians rallied much support from the allies for having suffered so much during the war. *Id.* at 12. The Armenians and the Kurds presents a joint memorandum at the Peace Conference in Paris in 1919 in preparation for becoming autonomous regions. *Id.* at 13. This memorandum was included in the Treaty of Sèvres. *Id.* Unhappy with the thought of an autonomous Armenia in Turkey, Kurdish forces along with Turkish officers forced the group from eastern Turkey. *Id.* at 13–14.

70. *Id.* at 13. The language in the Treaty of Sèvres provided:

If after one year has elapsed since the formation of the present treaty, the Kurdish population of the areas designated calls on the Council of the League of Nations and demonstrates that a majority of the population in those areas wishes to become independent of Turkey, and if the Council then estimates that the population in question is capable of such independence and recommends that it be granted, then Turkey agrees, as of now, to comply with this recommendation and to renounce all rights and titles to the area. . . . If and when the said renunciation is made, no objection shall be raised by the main Allied powers should the Kurds living in that part of Kurdistan at present included in the vilayet of Mosul seek to become citizens of the newly independent Kurdish state.

*Id.* (quoting Treaty of Peace with Turkey (Treaty of Sèvres), art 64 (May 1, 1920), <https://web.archive.org/web/20140531175547/http://treaties.fco.gov.uk/docs/pdf/1920/TS0011.pdf>).

71. *Id.*

72. *Id.* at 14. The main goal of the “Turkish hero,” General Mustafa Kemal, was to purge Turkey of Christian influence and ideals to create Muslim unity. *Id.* Along with the Armenians, Kemal pushed further west to fight the Greeks to prevent them from regaining land they had been granted in the Treaty of Sèvres. *Id.* In 1922, after the signing of the Treaty of Lausanne, Kemal deprived the leaders of the Kurdish people of their religious authority. *Id.* at 14–15.

73. McDowall, *supra* note 6, at 14.

Sèvres conditions that would have involved military force; nor were they prepared to negotiate on behalf of . . . the Kurds.<sup>74</sup>

As a result, the Treaty of Lausanne was signed on July 24, 1923, superseding the Treaty of Sèvres.<sup>75</sup> The Treaty of Lausanne was an agreement which recognized the new Ankara-based “nationalist” government.<sup>76</sup> The main difference between the two treaties was that the Treaty of Lausanne did not recognize Kurdish national rights or even directly refer to the Kurdish people.<sup>77</sup> As such, districts inhabited by the Kurdish people were kept under Turkish control.<sup>78</sup> The signing of the Treaty of Lausanne with no mention of an independent Kurdish state signaled the end of Allied support for a unified Kurdistan.<sup>79</sup>

In the early 1960s, a new regime brought some hope—albeit short-lived—of an independent Iraqi Kurdish state. In 1963, the leader of Iraq, Abdel Karim Qassim, was deposed from his office in a coup.<sup>80</sup> The reported response from the United States government was to support the new incoming government led by members of a secular Arab nationalist movement, the Iraqi Baath Party.<sup>81</sup> In 1970, the Kurdish Democratic Party and the then-vice president of the new central government in Iraq, Saddam Hussein, reached an agreement.<sup>82</sup> This agreement assured the Kurdish people there would be more autonomy within the Kurdish occupied regions of Northern Iraq.<sup>83</sup> However, a few years later, the United States government saw the Iraqi Baath Party as a threat.<sup>84</sup> President Richard Nixon, along with the Shah of Iran, began funding Kurdish militia groups in the Kurds’ pursuit of true autonomy.<sup>85</sup>

Once again, this support for Kurdish autonomy was short-lived. In 1975, Iraq and Iran made a surprise agreement that forced the United States to

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74. O’Ballance, *supra* note 7, at 14.

75. Djene Rhys Bajalan, *The First World War, the End of the Ottoman Empire, and Question of Kurdish Statehood: A ‘Missed’ Opportunity?*, 18 ETHNOPOLITICS 13, 15 (2019).

76. *Id.*

77. *Id.*

78. *Id.*

79. O’Ballance, *supra* note 7, at 14.

80. Rick Noack, *The Long, Winding History of American Dealings with Iraq’s Kurds*, WASH. POST (Oct. 17, 2017, 4:50 AM), <https://www.washingtonpost.com/news/worldviews/wp/2017/10/17/the-long-winding-history-of-american-dealings-with-iraqs-kurds-2/>.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

cease all funding to the Kurdish rebels.<sup>86</sup> This cessation of support increased the Kurdish peoples' vulnerability to an imminent attack from Hussein.<sup>87</sup> In 1984, armed conflict broke out among the Turkish Army and Kurdistan Workers' Party (PKK).<sup>88</sup> During these conflicts, upwards of one million Kurdish people were forced to leave their homes in both rural and urban areas in eastern and southeastern Turkey.<sup>89</sup> These people were forced to settle in urban centers as well as towns in the western and southern portions of the country.<sup>90</sup>

One of the more devastating attacks experienced by the Kurdish people occurred in 1988.<sup>91</sup> There, Hussein used chemical weapons against the Kurdish people, killing thousands of Iraqi Kurds.<sup>92</sup> At the time of this attack, the United States had, again, officially ceased all relations with the Kurdish rebels it recently supported.<sup>93</sup> While arbitrary arrests and torture were common, the Turkish state was only able to maintain control of the southeastern territory of Turkey through the forced evacuation of over 3,000 villages, which forced three million Kurdish people into destitution.<sup>94</sup>

### C. *The Gulf War*

The First Gulf War began when Iraqi forces occupied Kuwait in 1990, ending the estrangement of the United States and the Kurdish people, which spanned over a decade.<sup>95</sup> Even after Iraq was defeated in Kuwait, uprisings from Shiite Iraqis and Iraqi Kurds continued without support from the United States government.<sup>96</sup> With the close of the Gulf War in 1991, the United States made a policy decision to avoid the risk of destabilizing Iraq politically and stopped short of overthrowing Saddam Hussein—a decision

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86. *Id.*

87. *Id.*

88. *World Directory of Minorities and Indigenous Peoples: Kurds*, MINORITY RTS. GRP. INT'L, <https://minorityrights.org/minorities/kurds-2/> (June 2018) [hereinafter *World Directory: Kurds*].

89. *Id.*

90. *Id.*

91. *See* Noack, *supra* note 80.

92. *Id.*

93. *Id.*

94. *World Directory: Kurds*, *supra* note 88.

95. Noack, *supra* note 80.

96. *Id.* (stating that, in opposition to the Shiite groups of Iraqis and Kurds, the Iraqi Baath Party, led by President Saddam Hussein, was primarily comprised of members from the Sunni sect of Islam).

that would yield severe consequences for years to come.<sup>97</sup> Hussein went on to crush Kurdish and Shiite rebellions.<sup>98</sup>

Also in 1991, the United Nations made Iraqi Kurdish territory into a “safe haven,” providing much needed protection for the inhabitants of those territories.<sup>99</sup> In the years to follow, an opposition group called the Iraqi National Congress was established in Kurdistan with the support of the United States.<sup>100</sup> Even with this new sense of protection, divisions appeared among the Kurdish people.<sup>101</sup> As a devastating result of these divisions, the Kurdish Democratic Party—along with the help of troops from Hussein’s army—attacked the Iraqi National Congress in 1996, killing many rebel fighters after the United States denied crucial support.<sup>102</sup>

#### *D. Events After September 11, 2001*

The post-war independence of Iraqi Kurds made Turkey extremely nervous. Bombing and counter-insurgency operations continued into 2012, causing death and displacement on both sides.<sup>103</sup> Despite these violent occurrences, ceasefire negotiations began in October, 2012.<sup>104</sup> In 2013, a ceasefire was enacted between the PKK and the Turkish government, which brought hope for an end to decades of dispute and violence.<sup>105</sup> However, two years later, the ceasefire ended and ushered in a new wave of violent, destructive conflict.<sup>106</sup> This resurgence of conflict prompted harsh restrictions by the Turkish government.<sup>107</sup> In efforts to restrict PKK soldiers, the Turkish government severely restricted the Kurdish peoples’ ability to demonstrate, access websites related to their cause, and move freely, with the implementation of curfews.<sup>108</sup> The Turkish government also limited the Kurdish peoples’ access to electricity, food, water, and medical

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97. ANGEL M. RABASA ET AL., RAND PROJECT AIR FORCE, THE MUSLIM WORLD AFTER 9/11, at 3 (2004), [https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND\\_MG246.pdf](https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG246.pdf).

98. *Id.*

99. Noack, *supra* note 80.

100. *Id.*

101. *Id.*

102. *Id.*

103. *World Directory: Kurds*, *supra* note 88.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

treatment.<sup>109</sup> While the PKK is responsible for many violent attacks, the Turkish government responded with widespread human rights abuses, including torture, murder, and the mass shelling of predominately Kurdish areas, causing extensive destruction and displacement of hundreds of thousands of residents.<sup>110</sup>

In September 2017, independence reform overwhelmingly supported by Iraqi Kurds raised tensions between the Iraqi cities of Erbil and Baghdad.<sup>111</sup> This reform caused President Haider al-Abadi to demand its annulment with the threat of isolation to the landlocked region.<sup>112</sup> Independence of the Kurdish people in Iraq would have caused significant concern for the neighboring countries of Iran, Syria, and Turkey; such independence would likely encourage the uprising of Kurdish tribes in those countries while providing a place of safe harbor for Kurdish rebels.<sup>113</sup> Turkey and the Kurdistan Regional Government (KRG), formed strong economic ties to include a prosperous oil trade, via oil pipeline, which was threatened to be shut down in retaliation for the independence reform.<sup>114</sup> Despite threats, the KRG continued with the referendum out of fear “that U.S. support . . . will only dry up as the campaign against the Islamic State winds down.”<sup>115</sup>

By 2016, Turkey successfully pushed into Syria and established a “safe zone” to house Syrian refugees forced to flee the violence that resulted from ISIS control of Syrian land.<sup>116</sup> Taking the ninety-eight kilometer stretch of border between Turkey and Syria, Turkey was able to cut off the jihadists’ last remaining external pipeline.<sup>117</sup> Though the idea for the “safe zone” for refugees was a noble reason to push for possession of this stretch of land, it was not the true reason for the offensive.<sup>118</sup> The main objective of this move was to prevent the Syrian Kurdish militia from extending its territory

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109. *Id.*

110. *Id.*

111. *The Time of the Kurds*, *supra* note 64.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* As noted previously in this text, the Kurdish people had justifiable reluctance in their reliance on support from the U.S. government for continued support which explains an even more urgent reason to push for further autonomy and reform. *See supra* text accompanying notes 85–98.

116. David Gardner, *Turkey’s Syria Move Takes Aim at Both Isis and Kurds*, FIN. TIMES LTD. (Sept. 7, 2016, 2:24 PM), <https://www.ft.com/content/da458526-74fa-11e6-bf48-b372cdb1043a>.

117. *Id.*

118. *See id.*

further than it already had by forcing ISIS troops out of the area with the help of U.S. air support.<sup>119</sup> Moreover, the Turkish government used U.S. aims of clearing ISIS from the region to justify the removal of Kurdish militias within the safe zone.<sup>120</sup>

In December 2018, the United States announced it would withdraw troops in Syria, following the defeat of ISIS.<sup>121</sup> However, this decision was scaled back as a result of criticism from Congress and opposition within the Executive Branch.<sup>122</sup> By August 2019, after threats from the Turkish government to launch military operations into Syrian Kurdish-controlled territory, the United States and Turkey set out to create the “safe zone” previously planned in the northeastern border area of Syria.<sup>123</sup> This endeavor required the removal of trenches and other military barriers in the region.<sup>124</sup> However, Turkish officials would later inform the United States of their plans to occupy the space rather than maintain it as a “safe zone.”<sup>125</sup>

In 2019, President Donald Trump withdrew completely from the area, arguing that he was not willing to sacrifice American lives for “these ridiculous Endless Wars.”<sup>126</sup> However, the decision to withdraw from Syria and abandon the Kurdish people was not popular among the United States House of Representatives.<sup>127</sup> It voted in opposition of the withdrawal and passed a resolution to represent this opinion.<sup>128</sup> Following this vote, President Trump signed an executive order bringing sanctions against any member of the Turkish government involved in the offensive strategy to occupy Northern Syria.<sup>129</sup> The Treasury Secretary stated: “The United States is holding the Turkish Government accountable for escalating violence by Turkish forces, endangering innocent civilians, and destabilizing the region.”<sup>130</sup>

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119. *Id.*

120. *Id.*

121. *United States Withdraws Troops From Syria, Leaving Kurds Vulnerable*, 114 AM. J. INT’L L. 143, 143 (2020).

122. *Id.*

123. *Id.*

124. *Id.* at 144.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 145 (citing Exec. Order No. 13,894, 84 Fed. Reg. 55,851 (Oct. 14, 2019)).

130. *Id.* (quoting Press Release, U.S. Dep’t of Treasury, Treasury Designates Turkish Ministries and Senior Officials in Response to Military Action in Syria (Oct. 14, 2019), <https://home.treasury.gov/news/press-releases/sm792> [<https://perma.cc/NU5X-QULW>]).

During this time, Kurdish forces reached an agreement with Syrian officials that would allow government troops to return to the northern border to combat invading Turkish troops.<sup>131</sup> After this agreement, Syrian and Russian troops quickly entered the territory, filling the void left by the United States' troop withdrawal.<sup>132</sup> The Turkish and Russian governments negotiated a ceasefire, agreeing they would share supervision of the nearly twenty-mile-wide strip of land.<sup>133</sup> As part of this agreement, a small number of United States troops would remain in areas containing oil.<sup>134</sup>

Shortly after this agreement, a United States military raid—aided in large part by information gathered by Kurdish allies—was conducted in northwestern Syria, killing prominent ISIS leader Abu Bakr al-Baghdadi.<sup>135</sup> After this operation, the Turkish government reiterated its plan to relocate one million Syrian refugees into the area to be used as a “safe zone.”<sup>136</sup> However, as of November 2019, tensions and violence in the area continued, with nearly two million people still in need of humanitarian care.<sup>137</sup>

Throughout the Syrian conflict, Kurdish leaders in Turkey, Iraq, and Syria have tried to position themselves in a manner conducive with garnering support from international allies—particularly the United States and Europe.<sup>138</sup> In 2015, a political party within the Kurdish government sought to increase democratic rights for all of Turkey but primarily for the Kurdish people.<sup>139</sup> This push to expand Kurdish political rights was an attempt to boost legitimacy not only for their own people but also for Kurdish perceptions internationally.<sup>140</sup> As the conflict in Syria intensified, the Kurdish people pushed for greater rights.<sup>141</sup>

At the start of the war in Syria, thousands of Kurdish people were granted citizenship and Syria refrained from conflict with them.<sup>142</sup> As fighting against ISIS continued in Syria and Iraq, Kurdish leaders used the

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131. *Id.* at 146.

132. *Id.*

133. *Id.* at 146–47.

134. *Id.* at 147.

135. *Id.*

136. *Id.* at 148.

137. *Id.*

138. Zeynep Kaya & Matthew Whiting, *Sowing Division: Kurds in the Syrian War*, 24 MIDDLE E. POL'Y 79, 81 (2017).

139. *Id.* at 82.

140. *Id.*

141. *Id.*

142. *Id.*

conflict as a platform to promote their own agenda, arguing that liberation of the Kurdish people was the same as gaining democratic rights.<sup>143</sup> With continued conflict in Iraq and Syria, and the subsequent weakening of the governments, the Kurdish people were afforded greater opportunities to move forward toward autonomy.<sup>144</sup> However, this was not the case in Turkey, as the Turkish government remained strong and maintained both military and political support from international allies.<sup>145</sup>

The increased determination of Kurdish groups in Syria caused division amongst themselves and the Kurdish people of Iraq and Turkey.<sup>146</sup> The emergence of the autonomous Kurdish territory in northern Syria, called Rojava, further divided Kurdish tribes in the Middle East.<sup>147</sup> This development highlighted division within the Kurdish elite through the Middle East as they fought to manipulate influence within the region to pursue their own interests, agendas, and ideas of what the future of Kurdish government should look like.<sup>148</sup>

Though the Syrian War brought a temporary degree of unity among Kurdish tribes, the emergence of Rojava inevitably caused division between the Kurdish people and emphasized their competing political interests.<sup>149</sup> Moreover, the possibility of autonomy for the Kurdish people in Turkey seemed nearly impossible when the United States chose to support the Turkish government rather than the Kurdish people in Turkey's attempts to regain territory in the northern region.<sup>150</sup>

## *II. Turkey's State of Emergency Declaration and UN Report on Human Rights Violations*

In response to what has been labeled a coup attempt in 2016, the Turkish government declared a state of emergency leading to a "deteriorating human rights situation, exacerbated by the erosion of the rule of law."<sup>151</sup> Stemming from serious concerns over actions taken by the Turkish

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143. *Id.* at 82–83.

144. *Id.* at 83–84.

145. *Id.* at 85.

146. *Id.* at 83.

147. *Id.* at 84.

148. *Id.* at 88.

149. *Id.* at 86.

150. *Id.* at 88.

151. Off. of the U.N. High Comm'r for Hum. Rts., Rep. on the Impact of the State of Emergency on Human Rights in Turkey, Including an Update on the South-East, ¶ 1 (Mar. 2018) [hereinafter Rep. on the Impact of the State of Emergency].

government after its declaration of a state of emergency, the United Nations High Commissioner for Human Rights published a report detailing potential human rights violations in southeast Turkey.<sup>152</sup>

In Turkey's efforts to eradicate those allegedly responsible for the failed coup, "nearly 160,000 people [were] arrested during an 18-month state of emergency," including women who were pregnant or had just given birth.<sup>153</sup> Over 152,000 Kurdish civil servants were dismissed from government positions, including teachers, judges, and lawyers, leading to loss of income and eviction from publicly owned houses.<sup>154</sup>

In 2017, Turkey conducted security operations in villages "home to, in large part, [] Kurdish residents and targeted citizens of Kurdish origin of all ages for their perceived affiliation to the PKK."<sup>155</sup> The United Nations report detailed the use of torture and ill-treatment of those in custody, including beatings and sexual assault by Turkish police and military.<sup>156</sup> In addressing the situation in Turkey, the UN High Commissioner for Human Rights urged the Turkish government "to ensure that these allegations of serious human rights violations are investigated and the perpetrators are brought to justice" while calling for "full and unfettered access" to fully address the human rights situation.<sup>157</sup>

Actions by the Turkish government resulted in the closure of Kurdish NGOs, the shutting down of private schools with Kurdish language curriculums, and the dismissal of Kurdish teachers, academics, and officials.<sup>158</sup> Many Kurdish residents continue to be displaced from the areas they have called home for centuries.<sup>159</sup> While the primary reason for these displacements remains regional conflict, other controversial development projects, such as the 1,200 megawatt Ilisu Dam on the Tigris River threaten large scale displacement within Kurdish areas.<sup>160</sup> Minority Rights Group International suggests that upwards of 78,000 people may be displaced and

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152. *Id.*

153. *Turkey: UN Report Details Extensive Human Rights Violations During Protracted State of Emergency*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Mar. 20, 2018) [hereinafter *Turkey: UN Report*], <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22853&LangID=E>.

154. *Id.*

155. Rep. on the Impact of the State of Emergency, *supra* note 151, ¶ 111.

156. *Turkey: UN Report*, *supra* note 153.

157. *Id.* (quoting UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein).

158. *World Directory: Kurds*, *supra* note 88.

159. *Id.*

160. *Id.*

result in the destruction of valuable Kurdish heritage, some as devastating as the flooding and loss of the ancient city of Hasankeyf.<sup>161</sup>

### *III. Turkey's Domestic Law Regarding the Kurdish People*

In addition to their long history of marginalization and repression throughout Turkey and the Middle East, the Kurdish people have seen a concerted effort by the Turkish government to diminish or eradicate Kurdish culture within its borders. Since the ratification of the Treaty of Lausanne in 1922, the Kurdish people have “persistently been denied autonomy, let alone independence, and [were] also forced to assimilate into Turkish society.”<sup>162</sup> Turkish attitudes toward Kurdish culture during this period is best characterized by a statement given by a Turkish cabinet minister: “I believe that the Turk must be the only lord, the only master of this country. Those who are not of pure Turkish stock can have only one right in this country, the right to be servants and slaves.”<sup>163</sup>

Turkey has consistently sought to achieve Kurdish assimilation by restricting all aspects of Kurdish identity. In the 1920s and 1930s, Kurdish schools, religious foundations, and publications were abolished.<sup>164</sup> In 1938, the use of the Kurdish language was banned, and the words “Kurd” and “Kurdistan” disappeared from official vocabulary for an extended period.<sup>165</sup> Kurdish people, using the only language they knew, were fined for bargaining in Kurdish in the marketplace.<sup>166</sup> These changes led to an “alienat[ion] from the main-stream of public life in Turkey.”<sup>167</sup> This ban on the Kurdish language, coupled with the lack of Kurdish educational facilities, publications, and broadcasts, tremendously impacts cultural expression of Kurdish people where even the most “ardent champions of the Kurdish cause[] find it easier to express abstract ideas in Turkish.”<sup>168</sup>

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161. *Id.*

162. Hashimoto & Bezci, *supra* note 1.

163. Philip G. Kreyenbroek, *On the Kurdish Language*, in THE KURDS: A CONTEMPORARY OVERVIEW, *supra* note 6, at 53, 57 (quoting the Turkish newspaper *Milliyet*, Sept. 16, 1930).

164. *Id.* at 56; *see also* O'Ballance, *supra* note 7, at 15.

165. Kreyenbroek, *supra* note 163. During this period, the Kurdish people were referred to as “mountain Turks.” *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

In the 1960s, the Kurdish people saw a temporary reprieve from overt cultural repression by the Turkish government.<sup>169</sup> In 1961, a new Turkish constitution was drafted, allowing freedom of expression, freedom of association, and freedom of the press.<sup>170</sup> This period saw a “surge of renewed interest among the Kurds in their own cultural identity.”<sup>171</sup> However, the reprieve only lasted until 1967, when Turkish authorities barred the entrance of “publications and recordings in Kurdish into Turkey from abroad.”<sup>172</sup>

After a military coup in 1980,<sup>173</sup> a new constitution was promulgated.<sup>174</sup> Articles in this constitution stated that “no language prohibited by law can be used in the expression and diffusion of opinions.”<sup>175</sup> Further, “[n]o person may publish in a prohibited language.”<sup>176</sup>

Further exemplifying Turkish attitudes toward the Kurdish people, new repressive laws targeting the Kurdish language were enacted.<sup>177</sup> For example, in 1983 a new law declared that “[t]he native language of Turkish citizens is Turkish”; citizens may not “use as a native language a language other than Turkish and to participate in any activity aiming to diffuse these languages.”<sup>178</sup>

To Turkey’s credit, the latest version of article 10 of the Turkish Constitution does provide that “[e]veryone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.”<sup>179</sup> However, article 3 declares Turkish as the official language of Turkey<sup>180</sup> and article 42 holds that “[n]o language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education.”<sup>181</sup> As validation of its

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169. *See id.* at 58.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* (stating that Turkish General Kenan Evren enacted a new constitution in 1982 after leading a military coup); *see also* David Cutler, *Turkey’s 1980 Coup and Its Aftermath*, REUTERS (Apr. 4, 2012, 5:57 AM), <https://www.reuters.com/article/uk-turkey-trial-1980/factbox-turkeys-1980-coup-and-its-aftermath-idUKBRE8330F320120404?edition-redirect=uk>.

174. Kreyenbroek, *supra* note 163, at 58.

175. TURK. CONST. 1982, art. 26, *quoted in* Kreyenbroek, *supra* note 163, at 58.

176. *Id.* art. 28, *quoted in* Kreyenbroek, *supra* note 163, at 58.

177. *See id.*

178. Kreyenbroek, *supra* note 163, at 58 (quoting Turk. Law no. 2392, art. 3).

179. TURK. CONST. 1982, art. 10 (amended 2017).

180. *Id.* art. 3.

181. *Id.* art. 42.

policy towards minority groups including the Turkish people, Turkey references the Treaty of Lausanne.<sup>182</sup>

Despite language in the current Turkish Constitution that declares equality under the law<sup>183</sup> and a declaration citing intentions of “legalizing the use of Kurdish in Turkey,”<sup>184</sup> there are still restrictions in place that effectively preclude the Kurdish people from giving their children some Kurdish names.<sup>185</sup> Until recently, Turkish citizens could not use minority languages in naming their children.<sup>186</sup> In July 2003, a “reform of the law removed the restriction on parents’ freedom to name their children with names ‘deemed offensive to the national culture,’ but kept the requirement that names should ‘comply with moral values,’ and not be offensive to the public.”<sup>187</sup> However, “the law was restricted to curtailing names containing the letters q, w and x, which are common in Kurdish.”<sup>188</sup> Thus, the Turkish laws still restrict Kurdish people “from giving their children Kurdish names that include these letters.”<sup>189</sup>

#### *IV. The Turkish Judiciary Role in Kurdish Repression*

The Turkish judiciary is one of the “pillars of the ruling order” within the Turkish Republic.<sup>190</sup> Critics of the judiciary have targeted its “partisan attitude in political tensions, and its failure to protect human rights and defend democratic principles.”<sup>191</sup> The Turkish judiciary occupies the middle ground between the military and the bureaucracy, acting as “hegemonic preservation.”<sup>192</sup> In this role, the judiciary seeks to maintain hegemony of the ruling elite against the pressure of society.<sup>193</sup> The judiciary possesses

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182. Firat Cengiz & Lars Hoffmann, *Rethinking Conditionality: Turkey’s European Union Accession and the Kurdish Question*, 51 J. COMMON MKT. STUD. 416, 420 (2013) (“The Treaty defines minorities on the basis of religion excluding Kurds and other Muslim minorities.”).

183. See TURK. CONST. 1982, art. 10 (amended 2017).

184. Kreyenbroek, *supra* note 163, at 59.

185. *World Directory: Kurds*, *supra* note 88.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. Derya Bayır, *Representation of the Kurds by the Turkish Judiciary*, 35 HUM. RTS. Q. 116, 119 (2013).

191. *Id.*

192. *Id.* (quoting RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 214 (2004)).

193. *Id.* (quoting HIRSCHL, *supra* note 192, at 98).

“delegated power particularly ‘when the courts in that polity are generally inclined to rule in accordance with hegemonic ideological and cultural propensities.’”<sup>194</sup> In furthering that observation, Esin Özücü<sup>195</sup> argued that:

the legal system in Turkey has the aspiration to erase certain cultures and create a new culture, thereby assimilating people into a chosen image, when law meets cultures which it does not cater for, the judge either endeavours to eradicate or ignore them in keeping with the vision of the founding legislator, or, where he can, to accommodate them within the official framework.<sup>196</sup>

A study of judgments in Turkish courts demonstrated three positions regarding the judiciary’s representation of the Kurdish people: “(1) denying the Kurds’ separate existence and claiming their Turkishness; (2) acknowledging the Kurds while denying Kurdism; and (3) portraying the Kurds’ traditional law, culture and social structure as deficient.”<sup>197</sup> More recently in civilian courts, the Turkish judiciary has resorted to acknowledging the theoretical existence of Kurdish people but downplaying any meaningful distinctions by referencing commonalities with Turkish language, culture, and history.<sup>198</sup> Some courts even represent Kurdish people as the “‘other’ by referring to their traditions, customs, laws, and other aspects of Kurdish life, as ‘primitive,’ ‘backward,’ ‘bad,’ and ‘immoral,’ thus requiring steps to modernize and civilize them.”<sup>199</sup>

Views of Kurdish people within Turkish jurisprudence, to some degree, are traced back to official positions stemming from the Treaty of Lausanne.<sup>200</sup> At the Lausanne Conference, the chief negotiator<sup>201</sup> for Turkey

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194. *Id.*

195. Esin Özücü is a Professor Emerita of Comparative Law at the University of Glasgow, law graduate from the University of Istanbul and noted author. *Esin Özücü*, UNIV. OF GLASGOW SCH. OF L., <https://www.gla.ac.uk/schools/law/100years/100voices/esinorucu/> (last visited Apr. 10, 2021).

196. Bayır, *supra* note 190, at 120 (quoting Esin Özücü, *Judicial Navigation as Official Law Meets Culture in Turkey*, 4 J. INT’L L. CONTEXT 35, 42 (2008)).

197. *Id.* at 120.

198. *Id.* at 121.

199. *Id.*

200. *Id.* at 122.

201. The chief negotiator was Ismet Paşa, a “one-time prime minister and the second president of Turkey.” *Id.*

“declared the origin of the Kurdish people as ‘Turanian,’<sup>202</sup> rejecting contrary arguments.”<sup>203</sup> In a speech at the Lausanne Conference, the Turkish negotiator claimed that, “‘as regard[ing] manners, usage[,] and customs the Kurds do not differ in any respect from the Turk’”; rather, “‘the Turks and Kurds ‘form a single unit in respect of race, religion and manners.’”<sup>204</sup>

Particularly in martial court judgments prior to 1990, the Turkish judiciary attempted to eliminate the alterity of the Kurdish people by supporting claims that Kurdish people were not distinct from Turks.<sup>205</sup> Turkish martial courts heard cases where charges “‘came under the umbrella of ‘crimes against state security,’ committed in areas where the Martial Law was in operation.”<sup>206</sup> Applying views expressed at the Lausanne Conference, martial courts took positions claiming that “‘Kurds were a Turkish tribe and that ‘the Kurds are not racially different to Turks.’”<sup>207</sup> Thus, martial courts were able to “‘declare that the Kurds were not a ‘native race’ . . . of Anatolia, and announced that to claim such a thing was also factitious.”<sup>208</sup>

Prior to 1991,<sup>209</sup> any claims of an “‘independent existence outside of ‘national unity’” and protection of the Kurdish people as a distinct culture were banned.<sup>210</sup> The “‘criminalization of Kurdism” was rooted in principles of Turkish nationalism serving as the “‘cultural nationalism” and requiring assimilation of all Turkish citizens into the “‘culture of the Turks.”<sup>211</sup> As a

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202. See *Turanian*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Turanian/> (last visited Mar. 29, 2021) (defining Turanian as “a member of any of various peoples speaking Ural-Altaic languages.”).

203. Bayır, *supra* note 190, at 122–23 (quoting LAUSANNE CONFERENCE ON NEAR EASTERN AFFAIRS, 1922-23: RECORDS OF THE PROCEEDINGS AND DRAFT TERMS OF PEACE 342 (1923) [hereinafter LAUSANNE CONFERENCE]).

204. *Id.* at 123 (quoting LAUSANNE CONFERENCE, *supra* note 203, at 343).

205. *Id.* at 121.

206. *Id.* at 122.

207. *Id.* at 123 (quoting a case document from volume 5 of a 1992 work by Turkish sociologist İsmail Beşikçi).

208. *Id.*

209. *Id.* at 127 (“Until 1991, such demands were usually punished under Articles 141(4) and 142(3) of the now-defunct Turkish Penal Code of 1926 . . . . These provisions penalized ‘establishing organizations,’ ‘making propaganda,’ targeting a partial or complete removal of public rights recognized in the Constitution ‘on considerations of race’ . . . and destroying or weakening ‘national feeling’ . . . . The charges under Article 142(3) were termed ‘Kurdism propaganda crime’ . . . by the higher courts.”).

210. *Id.* at 126.

211. *Id.* at 127.

result, within the Turkish judiciary, “Turkish nationalism could not be ‘discriminatory or racist’” and Kurdism was labeled as “racism,” as it was “assumed to be promoting an idea based on a distinct Kurdish ‘race’ with its language and culture.”<sup>212</sup> After the termination of article 142, which made Kurdism propaganda a crime in the Turkish Penal Code until 1991, Turkish courts continued to justify their Kurdish views under article 7 of the “Anti-Terror Law as ‘separatist propaganda’ or as ‘propaganda aiming to blight the state’s indivisible unity with its territory and nation.’”<sup>213</sup>

*V. United Nations Declaration on the Rights of Indigenous People  
(UNDRIP)*

The United Nations Human Rights Office of the High Commissioner views the UNDRIP as the establishment of a “universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>214</sup> The Human Rights Council adopted the UNDRIP on June 29, 2006, more than a year before the General Assembly’s adoption.<sup>215</sup> The General Assembly deferred consideration of the declaration based on objections regarding the “language on self-determination and the definition of ‘indigenous’ people.”<sup>216</sup>

Initially, UN member states with sizable indigenous populations<sup>217</sup> objected to the UNDRIP because of “concerns over provisions on self-determination, land and resources rights and, among others, language giving indigenous peoples a right of veto over national legislation and State management of resources.”<sup>218</sup> The United States’ representative expressed disappointment in the Human Rights Council’s lack of response to a call for further work to generate a consensus text.<sup>219</sup> Specifically, the United States’ representative stated that the splintered vote “risked endless conflicting interpretations and debate about its application, as already evidenced by the numerous complex interpretive statements issued by States at its adoption at

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212. *Id.* at 127–28.

213. *Id.* at 128 (quoting Turk. Law no. 3717, art. 7).

214. *United Nations Declaration on the Rights of Indigenous Peoples*, U.N.: DEP’T OF ECON. & SOC. AFFS., <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited June 2, 2021).

215. *Id.*

216. Press Release, GA Adopts UNDRIP, *supra* note 2.

217. *Id.* Four countries voted against the initial adoption of the UNDRIP (Australia, Canada, New Zealand and the United States) and eleven countries abstained. *Id.*

218. *Id.*

219. *Id.*

the Human Rights Council, and the United States could not lend its support to such a text.”<sup>220</sup>

*A. Rights-Based Framework and Rights Codified Within the UNDRIP*

The UNDRIP has many provisions that would provide the Kurdish people in Turkey with rights to protect their cultural identity, including “both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others.”<sup>221</sup> The UNDRIP, which has now been endorsed by all countries in the United Nations and is a product of extensive and wide-ranging drafting participation, employs a “rights-based framework and uses rights-based language.”<sup>222</sup>

This “rights-based approach encourages cooperation and consultation between states, Indigenous peoples, corporations, civil society and the wider community.”<sup>223</sup> By adopting the UNDRIP, UN member states acknowledge they should engage Indigenous peoples while respecting their right to assert control over their property and their economic futures.<sup>224</sup> One of the principle rights recognized in the UNDRIP is the right to exist.<sup>225</sup> To that end, article 8 of the UNDRIP establishes that “Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”<sup>226</sup>

*B. Right to Self-Determination*

Indigenous peoples’ right to self-determination has been “described as ‘perhaps the most controversial and contested of the many controversial and contested terms in the vocabulary of international law.’”<sup>227</sup> So it should be of no surprise that the UNDRIP’s provisions on the right to self-determination are some of the most contested provisions. Some of the

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220. *Id.*

221. *High Commissioner for Human Rights Hails Adoption of Declaration on Indigenous Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (Sept. 13, 2007), <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6097&LangID=E>.

222. Robert McCreery, *Promoting Indigenous-led Economic Development: Why Parties Should Consult the UNDRIP*, INDIGENOUS L. BULL., Nov./Dec. 2012, at 16, 16–17.

223. *Id.* at 17.

224. *See id.*; *see also* G.A. Res. 61/295 (Sept. 13, 2007).

225. *See* G.A. Res. 61/295, *supra* note 224.

226. *Id.* at 4.

227. Mauro Barelli, *Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?*, 13 INT’L CMTY. L. REV. 413, 413 (2011) (quoting James Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in PEOPLES’ RIGHTS 7 (Philip Alston ed., 2000)).

distress with the right to self-determination stems from its roots with colonialism.<sup>228</sup> The traditional view of self-determination was formed around the process of decolonization; generally, self-determination was equated to the right of peoples subject to foreign occupation to create their own State.<sup>229</sup> However, a modern distinction has arisen between internal and external aspects of self-determination.<sup>230</sup> This distinction resulted in the cessation of self-determination's exclusive link to the idea of independence.<sup>231</sup>

It is this idea of an "internal" right to self-determination that has garnered support "both by academics and judicial and quasi-judicial bodies."<sup>232</sup> However, states are cautious to accept any right to self-determination for fear that groups within their borders would view the right to self-determination with secessionist overtones.<sup>233</sup> It is within this context that UN member states voted against the UNDRIP or abstained from the vote.<sup>234</sup>

Despite initial concerns from some UN member states, the UNDRIP includes and affirms the right to self-determination for indigenous people. Article 3 of the UNDRIP declares that "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."<sup>235</sup> While a straightforward reading of article 3 leaves little clarity upon which definition of self-determination the UNDRIP asserts, the drafting history implies the modern view, which outlines an internal right to self-determination.<sup>236</sup>

Moreover, article 46(1), when read in concert with article 3, limits the right to self-determination to the modern understanding. Article 46(1) of the UNDRIP declares that:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any

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228. *See id.* at 413–15.

229. *Id.* at 414.

230. *Id.*

231. *Id.*

232. *Id.* at 414–15.

233. *Id.* at 415.

234. *See supra* note 2.

235. G.A. Res. 61/295, *supra* note 224, at 4.

236. *See Barelli, supra* note 227, at 416–23.

action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.<sup>237</sup>

Regardless of the limitations imposed by article 46(1), the UNDRIP is the first international legal instrument that explicitly asserts the right to self-determination to indigenous peoples.<sup>238</sup>

Practically speaking, the right to self-determination asserted in the UNDRIP is defined by some as the “the right of indigenous peoples to freely pursue their political, economic, and social developments within the frameworks of their respective States.”<sup>239</sup> Essentially, the right to self-determination affords an indigenous group the right to participate or, more frankly, the right to be heard and taken seriously.<sup>240</sup> This concept represents a widely invoked principle within bodies asserting indigenous rights: the principle of free, prior, and informed consent (FPIC).<sup>241</sup> FPIC is a primary element of the right to self-determination as it “enables indigenous peoples to exercise control not only over their lands but also over their destiny.”<sup>242</sup> Article 32(2) of the UNDRIP asserts that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>243</sup>

Of note, the language in article 32(2) does not require the consent of indigenous peoples prior to approval of projects affecting their lands or territories.<sup>244</sup> Instead, the language within article 32(2) only requires consultation with indigenous people with a good faith effort of obtaining approval.<sup>245</sup> With that said, to comply with the provisions in the UNDRIP, UN member states may take legitimate steps to advance economic

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237. G.A. Res. 61/295, *supra* note 224, at 11.

238. *See* Barelli, *supra* note 227, at 422.

239. *Id.* at 427.

240. *See id.* at 427–34.

241. *Id.* at 431.

242. *Id.*

243. G.A. Res. 61/295, *supra* note 224, at 9.

244. Barelli, *supra* note 227, at 432.

245. *Id.*

development as long as they do so while considering the “rights of indigenous peoples, and particularly their right to self-determination, to own their lands, and to participate in the relevant decision making process.”<sup>246</sup>

### C. Definition of “Indigenous People”

The UNDRIP does not provide any meaningful clarification on what qualifies a group as “indigenous.” In fact, one of the key areas of concern from members of the Human Rights Council is that “[t]here is uncertainty as to the text’s application or non-application with respect to tribal groups, ethnic groups, minority groups, and indigenous peoples.”<sup>247</sup> Despite these concerns, the UNDRIP was adopted without any clarification on who qualifies as indigenous people risking conflicting interpretations.<sup>248</sup>

This lack of clarity may echo sentiments from a supplementary working paper on the concept of indigenous peoples produced for the United Nations Commission on Human Rights in 2007. In this supplementary paper, the working group expressed concerns over uncertainties as to who qualified as indigenous people and whether this definition included tribal groups, ethnic groups, or other minority groups.<sup>249</sup> The working group ultimately agreed not to pursue concerns regarding the definition of “indigenous people,” citing its belief that a definition would not be necessary if the text was consistent with international law.<sup>250</sup> Furthermore, the working group expressed its belief that the text should be “capable of being universal in its scope and application” as “indigenous situations vary from State to State and group to group.”<sup>251</sup>

Acknowledging the lack of a “singularly authoritative definition of indigenous people” in both the UNDRIP and the greater body of international law, the United Nations Human Rights Office of the High Commissioner does offer some criteria to help define “indigenous peoples.”<sup>252</sup> In a 2013 publication, the UN Human Rights Office utilized the

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246. *Id.* at 434.

247. Supplement to the Rep. of the Facilitator on the Draft Declaration on the Rts. of Indigenous Peoples, at annex I (July 20, 2007), <https://www.ohchr.org/Documents/Issues/IPeoples/ReportSupplement20July07.pdf> [hereinafter Supplement on Draft Declaration].

248. See Press Release, GA Adopts UNDRIP, *supra* note 2.

249. Supplement on Draft Declaration, *supra* note 247, at annex I.

250. *Id.* at annex III.

251. *Id.*

252. U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., FACT SHEET NO. 9/REV.2, INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM 2 (2013), <https://www.refworld.org/docid/5289d7ac4.html>.

José Martínez Cobo definition to outline pertinent factors useful in identifying “indigenous peoples.”<sup>253</sup> United Nations Special Rapporteur José Martínez Cobo submitted a comprehensive study on discrimination against indigenous peoples to the Commission on Human Rights.<sup>254</sup>

Though not officially adopted by the United Nations or the international community, Cobo’s definition is influential and frequently cited.<sup>255</sup> Cobo’s definition of “indigenous peoples” is constructed as:

those which, having a historical continuity with pre-invasion and pre-colonial societies . . . [who] consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>256</sup>

So, the utilization of Cobo’s definition would begin to form some analytical framework aiding in the identification of indigenous peoples.

#### *D. Problems with the Colonial Definition of “Indigenous”*

One issue with Cobo’s definition of “indigenous people” is that it revolves around language limiting “indigenous” to those people who were displaced through colonial conquest.<sup>257</sup> This concept stems from the European doctrine of discovery where indigenous legal status and rights were diminished or extinguished entirely.<sup>258</sup> This concept, and its inclusion as part of the understanding of indigenous people, is undoubtedly highly appropriate and relevant. However, limiting the definition of “indigenous

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253. *Id.*

254. Megan Davis, *Indigenous Struggles in Standard-Setting: the United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT’L L. 439, 442 (2008).

255. *Id.* at 442.

256. *Id.* (quoting José Martínez Cobo (Special Rapporteur), *Study of the Problem of Discrimination Against Indigenous Populations — Volume 5: Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub.2/1986/7/Add.4 (Mar. 1987)).

257. See Derek Inman et al., *Evolving Legal Protections for Indigenous Peoples in Africa: Some Post-UNDRIP Reflections*, 26 AFRICAN J. INT’L & COMPAR. L. 339, 342–43 (2018).

258. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 672.

people” with this concept is problematic in regions such as African or Asian states where it is difficult to identify people who were “first in time.”<sup>259</sup>

The African Commission’s Working Group of Experts on Indigenous Populations/Communities (African Working Group) was tasked with “examin[ing] the concept of indigenous people and communities in Africa” and “consider[ing] appropriate recommendations for the monitoring and protection of the rights of indigenous communities” in relation to the term “peoples” within the African Charter on Human and Peoples’ Rights.<sup>260</sup> In its report to the African Commission on Human and People’s Rights (African Commission), the African Working Group expressed concern that “if emphasis remains on early definitions that were intertwined with colonisation, the African continent will be left without a suitable concept for ‘analyzing internal structural relationships of inequality that have persisted after liberation from colonial dominance.’”<sup>261</sup>

When seeking to identify indigenous peoples in Africa, the African Working Group endorsed the following alternative elements:

self-identification; special attachment to and use of their traditional land whereby their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples; and experiences of subjugation, marginalisation, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model.<sup>262</sup>

In 2010, the African Commission applied its adapted view regarding who qualifies as “indigenous people” in *Centre for Minority Rights Development & Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*.<sup>263</sup> The Endorois people are believed to be the

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259. See Inman et al., *supra* note 2577, at 343 (quoting D.L. Hodgson, *Becoming Indigenous in Africa*, 52 AFR. STUD. REV. 1, 8 (2009)).

260. *Id.* (quoting AFRICAN COMM’N ON HUMAN & PEOPLES’ RIGHTS, RESOLUTION ON THE RIGHTS OF INDIGENOUS PEOPLES’ COMMUNITIES IN AFRICA-RESOLUTION 51 (2000)).

261. *Id.* at 344 (quoting AFRICAN COMM’N ON HUMAN & PEOPLES’ RIGHTS, REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP OF EXPERTS ON INDIGENOUS POPULATIONS/COMMUNITIES 93 (2005)).

262. *Id.*

263. Communication 276/2003, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] (Feb. 4, 2010), [https://www.escri-net.org/sites/default/files/Endorois\\_Decision.pdf](https://www.escri-net.org/sites/default/files/Endorois_Decision.pdf); see Inman et al., *supra* note 257, at 345.

traditional inhabitants of the Lake Bogoria area within Kenya.<sup>264</sup> The Endorois people used the lowlands surrounding Lake Bogoria during the rainy season as grazing land for their animals and would retreat to the Mochongoi forest during the dry season.<sup>265</sup> Additionally, Lake Bogoria held great cultural significance to the Endorois people; these people used sites in the area for cultural ceremonies and believe that the “spirits of all Endorois, no matter where they are buried, live on in the Lake.”<sup>266</sup>

The Endorois people used this land, unchallenged, for centuries.<sup>267</sup> In 1973, however, the land was declared protected by the Kenyan Government.<sup>268</sup> In 1986, the Kenyan government evicted the Endorois people from their traditional lands, resulting in a loss of many of their animals and economic hardships.<sup>269</sup> After many failed attempts to regain access to their lands through Kenya’s legal system, the Centre for Minority Rights Development and Minority Rights Group International filed a complaint with the African Commission.<sup>270</sup> This complaint claimed that the “Republic of Kenya violated their right to practise religion, their right to property, their right to culture, their right to free disposition of natural resources and their right to development.”<sup>271</sup>

In seeking a resolution, the African Commission noted that “the terms ‘peoples’ and ‘indigenous community’ arouse emotive debates”<sup>272</sup> and that “there is no universal and unambiguous definition of the concept[s].”<sup>273</sup> Furthermore, the African Commission found that “the term ‘indigenous’ is not meant to create a special class of citizen but is linked to the notion of ‘peoples.’”<sup>274</sup>

Essentially, the African Commission believed that the notions behind indigenous peoples are “closely related to collective rights, a concept that can be used to address the historical and present-day injustices and

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264. Inman et al., *supra* note 257, at 345.

265. *Id.*

266. *Endorois*, Afr. Comm’n H.P.R. Communication 276/2003, ¶ 6.

267. *Id.* ¶ 3.

268. Inman et al., *supra* note 257, at 345.

269. *Id.*

270. *Id.* at 346.

271. *Id.*

272. *Endorois*, Afr. Comm’n H.P.R. Communication 276/2003, ¶ 148, *quoted in* Inman et al., *supra* note 257, at 346.

273. *Endorois*, Afr. Comm’n H.P.R. Communication 276/2003, ¶ 147, *quoted in* Inman et al., *supra* note 257, at 346.

274. Inman et al., *supra* note 257, at 346.

inequalities felt by sections of populations with nation states.”<sup>275</sup> As such, the African Commission found that provisions within the African Charter include provisions allowing for people to retain rights as peoples in the collective, which includes indigenous communities.<sup>276</sup> The African Commission, in effect, extended the categorization of “indigenous people” to include groups of people who do not fit the more traditional definition of indigenous peoples based on colonialization.<sup>277</sup>

*E. Turkey and the UNDRIP*

Turkey voted to adopt the UNDRIP in 2007.<sup>278</sup> In clarifying its position, however, Turkey stated that the UNDRIP “was non-legally binding, but could serve as an important tool.”<sup>279</sup> Moreover, Turkey declared it “did not have any people in its territory that could be interpreted as indigenous peoples . . . and believed that the Declaration referred to the exercise of self-determination in line with the Charter obligations regarding non-interference in the sovereignty, integrity and political unity of States.”<sup>280</sup>

Based on these statements, Turkey appears to follow the colonialism-based definition of “indigenous people” and the modern interpretation of an internal right to self-determination. Asserting this view is most advantageous to Turkey since it can appear supportive of growing international support while denying any existence domestically.

Turkey has already taken steps to use this position as leverage in the international community. In response to a 2019 U.S. Senate resolution that recognized the mass killing of Armenians by Turkey more than a century ago as genocide, Turkish President Recep Tayyip Erdoğan condemned the resolution and threatened “parliamentary resolutions recognizing the killings of indigenous Americans in past centuries as genocide.”<sup>281</sup>

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275. *Id.*

276. *Id.*

277. *See id.*

278. Press Release, GA Adopts UNDRIP, *supra* note 2.

279. *Id.*

280. *Id.*

281. Jonathan Spicer, *Turkey Could Close Incirlik Air Base in Face of U.S. Threats: Erdogan*, REUTERS (Dec. 15, 2019, 1:50 PM), <https://www.reuters.com/article/us-turkey-usa-sanctions-incirlik/turkey-could-close-incirlik-air-base-in-face-of-u-s-threats-erdogan-idUSKBN1YJ0LL/>.

*VI. Legal Status of UNDRIP*

The UNDRIP, like most United Nations declarations, is non-binding.<sup>282</sup> The declaration could, however, provide evidence of either a codification or crystallization of customary international law. Customary international law consists of two elements: (1) “extensive and virtually uniform State practice” and (2) “the belief that the practice is required by law (*opinio juris*).”<sup>283</sup> Article 38(b) of the International Court of Justice Statute provides that the court should apply “international custom as evidence of a general practice accepted as law.”<sup>284</sup> *Opinio juris* requires an examination of state practice to determine whether there is an “understanding that such [practice] arises out of legal obligations.”<sup>285</sup> Essentially, customary international law requires a relatively uniform and consistent state practice regarding a particular issue and the belief that the practice is legally compelled by international law.<sup>286</sup>

The rights within the UNDRIP were ultimately accepted by the greater international community over thirty years ago.<sup>287</sup> While not dispositive, the three-decade discussion and the thirteen-year period since the UNDRIP’s adoption demonstrate the international community’s acceptance of these rights. As such, scholars argue that some of the rights outlined in the UNDRIP are a codification of customary international law.<sup>288</sup> Moreover, an advisory opinion from the International Court of Justice provided that a UN General Assembly resolution, such as the UNDRIP, could provide “evidence for the purpose of establishing a rule of [customary international law].”<sup>289</sup>

However, there is ample evidence that the states that signed onto this declaration viewed it as non-binding.<sup>290</sup> So, while there is wide-spread

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282. U.N. Permanent F. on Indigenous Issues, Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples 2 (n.d.) [hereinafter UNDRIP FAQ], <https://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

283. Sylvanus G. Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, 6 INT’L HUM. RTS. L. REV. 242, 245 (2017).

284. *Id.*

285. *Id.* at 246.

286. *See id.* at 244–46.

287. *See id.*

288. *See id.* at 249–51.

289. *Id.* at 250–51.

290. *See, e.g.*, Press Release, GA Adopts UNDRIP, *supra* note 2 (highlighting the Declaration as a non-binding text); UNDRIP FAQ, *supra* note 282 (“UN Declarations are generally not legally binding; however, they represent the dynamic development of

acceptance of the basic tenants of the provisions within the UNDRIP, it is unclear whether the UNDRIP is a codification or crystallization of customary international law. So, until or unless there is a demonstrable belief by states that they are legally compelled to follow the provisions within the UNDRIP, its standing as customary international law will remain in doubt.<sup>291</sup> Still, the near universal support of the UNDRIP throughout the international community is demonstrative of the resolution's support and may represent the start of a crystallization of customary international law in the future.<sup>292</sup> A further study would need to be conducted to determine if the UNDRIP now qualifies as customary international law. However, that is outside the scope of this Comment.

#### *Conclusion*

On its own, the UNDRIP will most likely afford little legal standing for the Kurdish people to pursue recourse. However, a broader and more defined definition that qualifies Kurdish people as indigenous people would provide the Kurdish people with internationally recognized rights. This clarification, along with Turkey's membership in the United Nations, should garner the Kurdish people support from the international community in their battle to maintain cultural independence.

As a stateless people, the Kurdish people are limited in what assistance international law might provide. Regardless of any potential legal standing, the Kurdish people will require support of the greater international community if they are to effect change in their circumstances. A clear recognition on the applicability of the UNDRIP to the Kurdish people will be an invaluable step towards that support.

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international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.”).

291. See Barnabas, *supra* note 283, at 242–61.

292. See *id.* at 253. All but four states voted in favor of UNDRIP. However, three of the States who initially voted against it now suggest they are in acceptance of the rights contained within the UNDRIP. *Id.*