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## OPINION

### ON THE RIGHT TO SELF-DETERMINATION OF THE KABYLE PEOPLE

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#### A. INTRODUCTION

1. We have been asked to advise the Mouvement pour l'autonomie de la Kabylie ("MAK") – known in English as The Movement for Self-Determination of Kabylia – on whether the Kabyle people have the right to self-determination.

#### B. SUMMARY OF OPINION

2. There are two questions which must be considered in determining whether the Kabyle people have the right to self-determination.
  - a. The first is whether the Kabyle people are a "people", as it is only a people who have the right to self-determination. In our view they are a people.
  - b. The second is whether, under international law, they have the right to self-determination. In our view, they have this right.

#### C. ARE THE KABYLE A "PEOPLE" ENTITLED TO THE RIGHT TO SELF-DETERMINATION?

3. The right to self-determination under international law is a human right which is held by "peoples". This is made clear in a multitude of international legal instruments, most notably:
  - a. The UN Charter, Article 1(2) of which list "*respect for the principle of equal rights and self-determination of peoples*" within the purposes of the United Nations;
  - b. Common Article 1 of the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (respectively, the

“ICCPR” and the “ICESCR”), which states that “[a]ll peoples have the right to self-determination”; and

- c. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (the “Friendly Relations Declaration”),<sup>1</sup> which declared that the right to self-determination is held by “all peoples”.
4. There are no settled criteria as to what constitutes a “people” under international law, and the precise meaning of the term is therefore uncertain.<sup>2</sup> The following considerations do, however, provide a useful guide.
5. One aspect that is widely accepted is that, as has been stated by the Supreme Court of Canada, “[i]t is clear that “a people” may include only a portion of the population of an existing state”: *Reference Re Secession of Quebec*.<sup>3</sup>
6. More specifically, a group of experts convened by the United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) identified a list of features which a “people” may possess. These are:

“1. A group of individual human beings who enjoy some or all of the following common features:

- a. A common historical tradition;
- b. Racial or ethnic identity;
- c. Cultural homogeneity;
- d. Linguistic unity;
- e. Religious or ideological affinity;
- f. Territorial connection;

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<sup>1</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to General Assembly Resolution 2625(XXV), 24 October 1970.

<sup>2</sup> International Court of Justice (ICJ), *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, I.C.J. Reports 2010, p. 403, Separate Opinion of Judge Cançado Trindade at [228].

<sup>3</sup> *Reference Re Secession of Quebec* [1998] 2 RCS 217 at [124].

- g. Common economic life.
  2. The group must be of a certain number which need not be large ... but which must be more than a mere association of individuals within a State;
  3. The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
  4. The group must have institutions or other means of expressing its common characteristics and will for identity.”<sup>4</sup>
7. Similarly, in his separate opinion in the ICJ’s *Kosovo Advisory Opinion*, Judge Cançado Trindade identified the following characteristics which a “people” will generally possess:

“there is a conjugation of factors, of an objective as well as a subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people”.<sup>5</sup>

8. Of the above factors, in our view the Kabyle people appear to possess the following:
- a. A common historical and cultural tradition. This can be seen, for example, from the traditional societal structure of communities of villages throughout the region which, prior to French colonisation, remained largely free from any form of centralised government.<sup>6</sup> Village-based law was a prominent feature of these communities, and aspects of this tradition have survived into the 21<sup>st</sup> century.<sup>7</sup>

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<sup>4</sup> Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Rights of People for UNESCO, SNS–89/CONF.602/7 (22 February 1990) at [22].

<sup>5</sup> *Kosovo Advisory Opinion* (note 2), Separate Opinion of Judge Cançado Trindade at [228].

<sup>6</sup> Described in detail in Judith Scheele, ‘Community as an Achievement: Kabyle Customary Law and Beyond’ in Fernanda Pirie and Judith Scheele (eds), *Legalism* (OUP, 2014) 177-200.

<sup>7</sup> Judith Scheele, ‘A Taste for Law: Rule-Making in Kabylia (Algeria)’ (2008) 50 *Comparative Studies in Society and History* 895.

- b. An ethnic identity. The Kabyle people are the largest Berber group in Algeria.<sup>8</sup>
  - c. Linguistic unity. The Kabyle people speak a specific dialect of Tamazight (the overarching name for all Berber/Amazigh languages) called Taqbaylit.<sup>9</sup>
  - d. A territorial connection. The Kabyle people are definitionally the Berber group from the Kabylia region, where the village communities referred to above are located.<sup>10</sup>
  - e. The consciousness of being Kabyle.<sup>11</sup> Whilst this is an inherently difficult factor to establish due to its subjective nature, it appears likely that such a consciousness does exist in light of the linguistic unity and cultural traditions referred to above, as well as the existence of widespread citizens movements among Kabyle people, both within Kabylia and throughout a large Kabyle diaspora (especially in France).<sup>12</sup>
9. In light of these factors, we consider that the Kabyle people do qualify as a “people” such that they have the right to self-determination under international law.

#### **D. DO THE KABYLE PEOPLE HAVE A RIGHT TO SELF-DETERMINATION?**

10. In our view, based on the international law documents set out in paragraph 3, as the Kabyle people are a people under international law, then they have the right to self-determination under it.

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<sup>8</sup> Michael Collyer, ‘The reinvention of political community in a transnational setting: framing the Kabyle citizens’ movement’ (2008) 31 *Ethnic and Racial Studies* 687 at p.692.

<sup>9</sup> Céline Jacquemin, ‘Kabyle resistance and Berber oppression’ in by Kenneth Kalu and Toyin Falola (eds), *Oppression and Resistance in Africa and the Diaspora* (2019, Taylor Francis) 131-145 at p.135.

<sup>10</sup> Scheele (note 7) at pp.179–180.

<sup>11</sup> See International Crisis Group, ‘Algeria: Unrest and Impasse in Kabylia’ (10 June 2003) at pp.3–7; Unrepresented Nations and Peoples Organization, ‘Briefing Note Kabylia’ (May 2018).

<sup>12</sup> Collyer (note 8) at pp.703–705.

11. The right to self-determination is a right that protects a group as a group entity in regard to their political participation, as well as their control over their economic, social, and cultural activities as a group. The important aspect of this is that it is a group or collective right, rather than an individual right, which aims to protect the people with the right to self-determination as a people, not as individuals.<sup>13</sup>
12. It has been held by the International Court of Justice that the right to self-determination is a matter of customary international law and so legally binding on all States.<sup>14</sup>

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<sup>13</sup> African Commission on Human and People's Rights, *Gunme et al v Cameroon*, Communication No. 266/2003 [2009] ACHPR 99 [171], [176].

<sup>14</sup> *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, *I.C.J. Reports 2019*, p. 95 at [152]–[155].

## **E. CONCLUSIONS**

13. In our view, the people of Kabyle are a “people” under international law.
14. As a consequence, the people of Kabyle have the human right to self-determination under international law.

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