

## INTERNATIONAL LAW AND THE KURDISH LIBERATION STRUGGLE IN TURKEY

Contribution for the International Workshop  
'International law versus Kurdish aspirations. Help or Hindrance?'  
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Preliminary remarks:

I would first like to thank you for inviting me to participate in this workshop, and also to say that I hope we shall have a useful and successful discussion on this difficult topic.

The topic is a difficult one not only because of the subject matter of international law, an area which is constantly developing, but also above all because of the question which is posed: what actually are the goals of the Kurdish struggle?

Six months ago the conditions facing the Kurds (to which I shall confine my remarks) seemed clear, as did the consequent goals. At all events there has now been a dramatic change, which is connected with the trial of PKK president Abdullah Öcalan and the official ending of the 15-year guerrilla war. It became clear to me in the course of preparing my article for this workshop that to engage in a discussion of the principles and the possibilities of international law without taking into consideration the present struggles of the Kurds would be to engage in a mere sterile intellectual debate.

Even if it is too soon to make a complete analysis and evaluation of this development, which many people find to be a very exciting one, it is necessary to undertake such an analysis and to begin the discussion about it.

So in my introduction I shall outline these connections (between the changes in international law and the new development in the Kurdish struggle against the historical and political background of western Europe in order to be able to concentrate on the implications in international law for the trial of PKK president Abdullah Öcalan.

Then I shall set out more precisely the hitherto valid implications of international law for the self-determination of the Kurds.

In my final section I shall survey the PKK's new policy and indicate the possible consequences from the point of view of international law.

### 1. Introduction

1999: critical year for the Kurds and the development of international law?

A few months before I was invited to take part in this workshop, we went through some unique events of great historic significance, which affected our subject both directly and indirectly.

When in spring 1999 NATO began bombing Yugoslavia, ostensibly to prevent a humanitarian catastrophe, some people even spoke of a genocide against the Kosovo Albanians, and some representatives of the German government did not hesitate to announce that "another Auschwitz" must be prevented, the idea evidently came to some Kurds to demand something similar to rescue their people.

Some human rights campaigners appeared on the scene in the United States and Western Europe who maintained that "Humanitarian intervention" was permissible under international laws even without UN authorisation, or at least that international law should be further developed in this direction.

At around the same time I received an invitation from Berlin to take part in a panel discussion at the Free University of Berlin in April with a right-wing conservative former Berlin senator on the subject of the "NATO bombing of Turkey as a solution to the Kurdish conflict".

I refused to take part in an event with this sort of political direction, because I considered the undeclared war set a dangerous precedent which undermined the UN's monopoly of force within the

international community, weakened the United Nations itself, and could be used to pervert currently-accepted international law, using the excuse of humanitarian rights, into a law of "might is right".

The rules of the UN charter and of the NATO treaty which expressly oblige the NATO states to strictly observe the UN Charter and international law as currently in force, do not allow attacks which are contrary to international law.

Every type of use of armed force is covered by the ban on use of force in international law in article 3, clause 4, of the UN charter.

There is no Common Law right /customary right in international law of "humanitarian" intervention by individual states, because the necessary consensus in the international community is lacking. In international law currently in force, the right to make "humanitarian interventions" belongs only to the bodies of the United Nations.

The UN Security Council has neither decided upon military sanctions under article 42 of the UN charter, nor empowered individual NATO states under article 42 and 48 of the UN charter or NATO as a regional organisation (Article 51 of the UN charter).

The exceptional case of Article 51 of the UN charter which justifies self- defence and emergency assistance for a state which is being attacked, is clearly not applicable, since no NATO state is being attacked.

No state which is being attacked has asked for emergency assistance.

And if other proof were needed of the speciousness of the explanations given being in terms of human rights, it was the comparison of developments in Kosovo with those in Kurdistan:

For decades a people has been oppressed and massacred, even the language and culture forbidden and persecuted, thousands of villages destroyed by the military, more than three million inhabitants driven out - by, in fact, a NATO state with western economic and military aid- without a single western government officially fighting this or even imposing effective sanctions. I see the reactions to the dramatic worsening of the policy of genocide in East Timor in September of this year in the same way: although the massacres (including in Christian churches while people were praying) could not be denied, it did not occur to the NATO strategists and politicians to conduct a "humanitarian" intervention, although East Timor had been occupied by Indonesia against international law - at last the UN has decided to help with military intervention, much too late and in accordance of the Indonesian government.

In my opinion these comparisons confirm the theory that with "humanitarian intervention" we are talking about a war to push through a new NATO doctrine (international interventions, including "out of area" in order to punish Serbia, the enemy, for economic and military-strategic reasons, while with NATO countries like Turkey, or with good friends like Indonesia, no-one even dreams of carrying out this sort of punishment attack. I have an uneasy feeling about the debate on the need for new international law, as though it could be distorted into a rather laborious way of concealing the modern version of "might is right".

Fortunately, not only has the panel discussion been cancelled, but the doctrine of "human rights intervention" remained such a minority opinion among international jurists of all countries as to be almost invisible, so we were not obliged to discuss it very seriously, and nor was there markedly greater sympathy among PKK circles for a NATO bombardment in order to achieve human rights for the Kurds. A completely different question again is one's political and historical evaluation of the NATO war, which was of immense significance for the perspective of the New World Order, to which I will return later.

2. The latter-day odyssey in search of a political solution, the consequent kidnapping of PKK President Abdullah Öcalan from Kenya, and their significance in international law.

Let me begin with a personal view of the case, which will lead straight into the middle of our difficult subject.

In a book which appeared last year, which I co-authored entitled "Ten Years of Cross-border Persecution of the Kurds - Contribution to a Human Rights Chronicle", I analysed the development of the international criminal persecution of exiled Kurdish politicians in Western Europe under the pretext of the "fight against terrorism", and in the last chapter I demonstrated that the first signs of a positive development away from the hostile image of "blood-thirsty terrorists" manifested themselves in the release of ERNK representative Kani Yilmaz on the day of judgment being pronounced on his case. The analysis ends with a warning which was to be bitterly proved true only a few months later; "For a free and unhindered (political) continuation of this activity, the precondition is an unconditional lifting of the ban on the PKK. After the end of the trial of the former ERNK European spokesperson Kani Yilmaz the conditions for this are better than ever. But this was only possible because the Chief Federal Prosecutor changed from a hardliner position in the battle against the PKK and joined the group who had a realistic line, who approved of dialogue and de-escalation, even if they didn't regard the PKK as friends or would have wanted to nominate the PKK leadership for the Nobel Peace Prize: the arrest warrant for PKK President Abdullah Öcalan dating from 1990 is still in existence, as the Chief Federal Prosecutor noted at his annual press conference of 13 January 1998. Several changes would still have to take place and some time would have to elapse before there would be any invitation to Öcalan as politician and representative of the Kurds..." 1

As you know, the PKK President left his domicile in Syria some months later, and travelled to Rome via Moscow with the agreement of representatives of the Italian government, in order to involve Western Europe in his efforts to find a political solution to the war in Kurdistan. I called on him there between November 1998 and January 1999 in my capacity as his defence lawyer in the proceedings in the German courts and as a member of his international defence team. At the beginning of our first discussion he explained to me, after we had talked about political developments of the last year since our last meeting, that Germany was the real goal of his journey to Europe. He wanted to offer the German people and government a comprehensive package of dialogue and co-operation in various areas, the details of which I cannot go into here. To his question of whether I could recommend a stay in Germany, I had to point out to him the risks and side effects of the international arrest warrant, which formed the basis of a current application to extradite him by the German government. In this application he was accused of being the ringleader in a so-called "terrorist organisation" inside the PKK under 129a of our penal code, as well as of various murders in Europe in the 1980s. Judging by my experience of similar 129a cases before state security panels of the High Court, one would have to assume he would risk being in custody for several years while an investigation was carried out, a main hearing with a lengthy period of taking evidence, and also a long prison sentence; I had to strongly advise him against travelling to Germany, while saying that we could of course try to induce the judicial system to stop the proceedings on the grounds of their being politically inappropriate, grounds expressly provided for by our Strafprozessordnung (code of criminal procedure of the article, SPO153e), but which in the past have been categorically refused in other criminal actions against Kurdish politicians.

The new Red-Green government, as is well known, declined to extradite the PKK President from Italy to Germany, an almost unique event, which was criticised particularly by conservative jurists, as was the statement made at the same time that they would like to see Öcalan brought before an "international criminal court". The official reason for declining to extradite him was to preserve peace under the law and the fear of unrest and attacks by Kurds. In fact we know from a reliable source that equally important was the realisation that during taking evidence during the main hearing, in the absence of evidence of his guilt, the PKK President might have to be acquitted. They wanted to spare themselves the disgrace of this and the predictable hysterical reaction from Turkey and therefore passed the parcel to Italy. Moreover, the German government was not prepared to negotiate, I was not able even once to obtain a discussion with a government representative about a possible stopping of the proceedings or about Öcalan's political ideas.

When I visited Öcalan in Rome in January of this year the situation had further dramatically intensified. He immediately told me that he was being pressured from all sides to leave Italy: on top of the trade boycott and psychological terror from Turkey, the government came under pressure from the USA and the domestic opposition who were advising that the European governments had left Italy in the lurch; his asylum application would not receive a favourable decision (which was not true as know since the court's decision in October), the government was threatening a criminal prosecution and imprisonment on the basis of the 1977 Terrorism Agreement - grounds on this occasion for the international arrest warrant from Turkey - in fact one could not exclude the possibility in the end that he would be extradited to Turkey, maybe with assurances from Turkey that the death penalty would not be imposed, etc. Even his Italian lawyers (both of them moreover parliamentary deputies of one of

the government parties) had exerted certain pressure upon him to leave Italy and, with the help of the Italian government, try to find other European states in which to seek refuge.

This astonished us, but it was clear to us, however, that in legal terms there was no handle for trial under Terrorism Law or even for an arrest.

So I forcefully advised him to stay in Italy and above all, if he were to leave Rome, only to do so with a commitment binding in international law from the Italian government and from the accepting state. At first Öcalan seemed convinced but two days later he told me, after more negotiations with government representatives, that he was going to leave Rome, he did not want to compromise his friends in the government, and we had the impression that for political reasons he wanted to avoid imprisonment. I repeated my warning and painted for him a picture of the life of a "refugee in orbit", pushed hither and thither from transit lounge to transit lounge, from country to country, without ever being let in and in the end becoming a victim of MIT, the Turkish Secret Service. Öcalan picked up on this and compared his fate with that of a gladiator in ancient Rome, who is about to be thrown to the wild beasts from Africa to be eaten. In a press release from the international defence team, we analysed the situation and demanded:

"Certainly there exists in theory the possibility of the institution of criminal proceedings on the basis of the 1977 European Anti-Terror Convention, on which the Italian Justice Minister would have to take a decision on political grounds. But in no way did this constitute a legal obligation. But above all, on the basis of the accusations from Turkey, the European Anti-Terror Convention is inapplicable on several grounds: The alleged criminal acts do not fulfil the criteria for a terrorist act as laid down in the European Convention. They took place in connection with the war between the Turkish military and the PKK, therefore in the framework of an international conflict in exercise of the right to self-determination, for which under Article 1, section 4, the 1st Supplementary Protocol of 1977 of the 1949 Geneva Convention is applicable. Even if, as in the case of Turkey, one does not judge the war to be an international conflict, the 2nd Supplementary Protocol of 1977 applies to it.

That is to say, the establishment of a criminal court exclusively to sentence the President of the PKK would not only fail to meet legal considerations, which forbid judgement by a special court, but under Article 3 section 2 of the 2nd Supplementary Protocol would also constitute an improper interference in the conflict.

The so-called representative obligation to instigate criminal proceedings in respect of crimes abroad against foreigners in foreign territory is certainly theoretically possible according to the Italian Penal Code (Article 10), but is so far without precedent.

The 1972 Convention on taking over a criminal proceeding against a foreigner in respect of a criminal act which should actually be taken by the other state, which has been thrown into the debate, is inapplicable because Italy (like Germany) has never acceded to it.

PKK President Öcalan emphasised in his discussions with us that he would have no objection to the setting-up of an international criminal tribunal on the model of the courts for the former Yugoslavia or Rwanda, as long as the crimes of the Turkish military government were also subject to indictment and public hearing. We re-affirm: that all forms of criminal proceedings would also constitute an interference in the affairs of a legitimate liberation movement under the pretext of fighting terrorism by dubious methods." 2

Since then I have not seen him again, and I only gathered news of his consequent fate from the media, from PKK circles and from other Kurds, until suddenly the news of his abduction from Kenya broke, first as a rumour and then with the notorious video of the PKK President, bound, blindfolded and obviously having been mistreated, in the hands of the Turkish secret services - pictures which roused Kurds all over the world to protests and solidarity actions and drew politicians and human rights campaigners onto the scene. In a further press release the international defence team explained:

"The video clips on Turkish television, showing a prisoner bound and blindfolded, being displayed as a 'trophy' and clearly at least under the influence of drugs, constitutes a violation of the ban on inhuman treatment in the sense of Article 3 of the European Convention on Human Rights."

3. Abduction of PKK President contrary to international law; complete disregard for international law as basis for the criminal proceedings against him.

3.1 The abduction was a conspiracy by various secret services, obviously managed by the United States and with the participation of the English secret service (as only recently became well-known, see Sunday Times article of 22/8/99, according to which British security firms worked with the Turkish government on plans costing more than DM10 million to either 'eliminate' or kidnap him.) Turkey rejoiced at his abduction, it was welcomed by the United States, criticised behind closed doors in Europe and unanimously condemned by jurists and other human rights campaigners- for example, by the Association of European Jurists on 18/2/99. A few days later we lodged a human rights complaint with the European Court in Strasbourg and highlighted the illegal kidnapping, the threats, ill-treatment and torture, as well as the way in which an effective defence was being prevented. At the same time because of the need for speed, we applied for temporary measures for relief, and to the great surprise of observers and participants, the European Court of Human Rights made a decision unique in judicial history and ordered, even before approving the appeal, Turkey to make sure that an effective defence could be mounted, in particular for unmonitored interviews, i.e. interviews between Abdullah Öcalan and his defence lawyers to be guaranteed by Turkey. In a press release by the international defence team we analysed the situation and demanded:

"We welcome the decision of the Strasbourg judges and are eager to see whether the Turkish justice system is ready and in a position to meet the demands which have been made swiftly and without demur; i.e. to grant the prisoner unsupervised interviews with the lawyers of his choice, full access to files, writing materials, etc. as well as enough time for preparation to defend himself against the extensive accusations;

Apart from the question of access for lawyers, we know that an effective defence in a fair trial carried out in accordance with the law is impossible in a Turkish State Security Court, as long as (...) the abduction from Kenya to Turkey, contrary to international law, and the gross public pre-judging of the case by government, leading politicians and the whole mass media is not reversed; and as long as the PKK's fight is not regarded as a national liberation struggle in the sense of the UN Charter and of the 1977 Geneva Protocol, or at least as an armed conflict, but as mere "terrorism" and "separatism", by which means the Turkish armed forces' policy of oppression and assimilation is blanked out."

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3.2 The European Committee for the Prevention of Torture which was set up as a result of an international law agreement between the European states, made an ad hoc investigation on the prison island of Imrali, and visited Öcalan in his prison cell. Much later a short report, as provided for by the regulations, was published with the assent of Turkey. In the report Öcalan's isolation as a single prisoner on the prison island was criticised, as were the few possibilities for visits, lack of opportunity to watch TV or listen to the radio, etc.etc. The background to this is the opinion of a report by the UN Human Rights Commission, according to which imprisonment in isolation, at least for a long period (of 6 months or more), constitutes ill treatment similar to torture, which is forbidden on the basis of several international law reports (cf amongst others Article 3 of the European Convention on Human Rights).

Until to-day, more than 6 months later, Turkey has ignored the orders of the European Court:

Abdullah Öcalan has until to-day's date not been able to hold a single unmonitored interview with his defence team. He is only allowed an hour twice a week under the observation of members of the security forces, in fact of the armed forces.

Until to-day he is still kept in complete isolation ( he receives only three pro-government Turkish newspapers, similar books and a radio with no longwave band, and visits from a few members of his family of half an hour's duration and visits from his lawyers).

The Turkish authorities would never dream of complying with the orders and recommendations of European institutions based on agreements in international law. Rather they have presumed to make criticisms, especially of the decision of the European Court of Human Rights as: "improper interference in the internal affairs of Turkey" which they would vigorously forbid. Daniel Tarschys, General Secretary of the Council of Europe, rejected this in a newspaper article for Le Monde with the argument: "I do not accept this point of view (i.e. 'interference in the internal affairs of Turkey'). The Turks are in part full Europeans and must be recognised as such. Turkey, like other members of the European Council, has committed itself to accept and defend democracy, the rule of law and human

rights. As far as democracy and human rights are concerned, from now on there are no longer any 'internal affairs' or external ones in Europe."5. But clearly all this does little to impress the rulers of Turkey.

#### 4. Criminal Proceedings against Öcalan in the light of international law.

Here is neither the time nor the place to describe the criminal proceedings against Öcalan in detail or to analyse or assess them, quite apart from the fact that the necessary material for a thorough analysis is not available or has not been processed.

The first point of significance for a critical assessment is that the reporting of the trial in the popular press was defined by the image spread by the censored state TV channel TRT which has a particular easily recognised interest: the portrayal of Öcalan as a "grovelling dog", begging for his life. This image, peddled by the overwhelming majority of the hand-picked foreign correspondents who were allowed to observe the trial, obviously does not correspond to the facts. It is therefore hard to assess his defence strategy correctly. However fortunately there exists a book in English containing his defence speech, to which I will return.

On the other hand it is certain that Öcalan did not behave in court many people, including some of his Kurdish supporters had expected of him, nor was the content of his statements as expected. Instead of fundamentally rejecting the indictment and the legitimacy of the proceedings against him, he tried to use the court as a tribunal to push the subject of most concern to him, the political solution in a form that would open up a dialogue with the rulers of Turkey. One could even consider his apologies to the members of families of fallen soldiers as a concession made in this spirit to the prevailing public opinion, though this was something that was particularly held against him by the general public subsequently.

But in legal terms it is completely wrong to talk of a "fair trial" as even some members of the European Parliament have done just because the presiding judges allowed the accused to speak, contrary to the usual practise of the State Security Courts, and even reprimanded the prosecuting lawyers once or twice. There can be no talk of a "fair" trial in accordance with the law, i.e. with the accused as a legal subject having the same rights as the public prosecutor, because:

the abduction, in contravention of international law, constitutes a hinderance of due process that cannot be undone;

an effective defence was not possible for lack of unmonitored defence interviews and because of completely inadequate preparation time;

there was gross public pre-judging by the state authorities and the mass media, and this was continued in the court room with the presence of members of families of fallen soldiers with large pictures of their deceased relatives, which made any neutral approach impossible thereafter;

not only the conditions of imprisonment but the whole proceedings were under the direct control of the Turkish armed forces, even if the military judge, criticised by the European Court in earlier cases, was removed from the main hearing and replaced by a civilian judge.

This last point - the Turkish armed forces as the real prosecutors and judges all rolled into one - does not only indicate the lack of separation of powers as a basic principle of democracy in Turkey. Rather, this fact demonstrates a problem which taints the trial of Öcalan quite fundamentally and does so from the outset: as President of the PKK he should not in any way have been made to stand trial for individual criminal acts in connection with the guerrilla struggle of the PKK, because we are dealing here with a legitimate national liberation movement, in the sense of the UN Charter and of the international humanitarian law of war, with the consequence that he should be treated as a prisoner of war. Here we are talking in my view of a completely central question which has repeatedly, perhaps for still current reasons which are dropped out of the picture (see below) although excellent preliminary work has been carried out on this issue, including by speakers present here, Prof. Karen Barker and Judge Ralf Fertig, and by Prof. Norman Paech, a specialist in international law of the Hamburg University of Economics and Politics, (who has submitted a comprehensive opinion on this question for a lawsuit which I conducted on behalf of a Kurdish Association before the Federal Administrative Court in Berlin).

In what follows, I shall go into some of the essentials of this as the subject is still of burning topical interest, even if the PKK's guerrilla struggle in Turkey is officially supposed to have "ended forever" (press release by Osman Öcalan, member of the PKK Presidential Council, September 1999). Academic reappraisal of the last 15 years, as well as the political, social and human "costs" demands a clear assessment and evaluation of the international law implications of the guerrilla struggle and the guerrilla fighters, together with their families and their social sphere, if they are not to be left with a vague pariah status either in Kurdistan or in exile.

## 5. Evaluation of the Guerrilla Struggle of the PKK in Terms of the Humanitarian International Law of War

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### 5.1 Citations

The debate on notion and content of the principle of self-determination is founded on a general assumption that this principle has to do somewhat with freedom, independence and human rights. People also think that the right is codified in the United Nations Charter, which therefore provides for self-determination in such terms. But the legal situation is much more complicated than that, as Rosalyn Higgins states: "Our contemporary understanding of the concept of self-determination has been generated by the interplay of a variety of historical factors. But, contrary to popular mythology, it does not find its origins in the UN Charter. Other law-making mechanisms have been at work."<sup>7</sup>

The right to self-determination, despite its very early roots in the American Declaration of Independence of 1776 and the French Constitution of 1791, only became qualitatively linked to the rights of peoples in the 20th century although today it is generally accepted as a *ius cogens*.

The notion travelled upon a long path before first being mentioned in Article 1 section 2 and Article 55 of the UN Charter. But this rather vague reference in connection with fundamental equality made self-determination more of an unbinding programme rather than a recognised right. This only changed after the people living under colonial rule appeared on the world stage alongside the nations of the UN to demand their independence and state sovereignty from the colonial powers. The judicial lever of their struggle was the right to self-determination and the decolonisation of the political field, thus strengthening the programme to a guaranteed fundamental right.

The first step was taken on 14 December 1960 when the UN General Assembly passed the "Declaration on the Granting of Independence to Colonial Countries and Peoples" in Resolution 1514 (XV).

In the next phase of legal development the UN General Assembly began to build a bridge from self-determination as a legal obligation in the process of decolonising to self-determination as a human right. They placed the right to self-determination at the top of both International Covenants on Civil and Political Rights as well as the Economic, Social and Cultural Rights on 19 December 1960, adopting a more individualistic notion of the right by that. In Article 1 of both pacts, it is unanimously stated that:

1) all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Both pacts first went into effect in 1976. Prior to this, the states of the UN General Assembly had already given an authentic interpretation and detailed justification of the right to self-determination in Resolution 2625 (XXV), the "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States in Accordance with the Charter of the United Nations" (Declaration of Principles), which was passed on 24 October 1970. In the chapter entitled "The principle of equal rights and self-determination of peoples" is written:

"By virtue of the principle of equal rights and self-determination of peoples enshrined in the United Nations Charter, all people 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."

This resolution marks the time when the right to self-determination was made a fundamental law which all states had to recognise. This notion has been strengthened in several subsequent UN General Assembly resolutions.

The Commission on Human Rights issued a report concerning this right in 1976 which listed several examples of its status as a binding law (*ius cogens*), and the International Court of Justice has upheld its binding status in a number of reviews and decisions.

Eventually, the final resolutions passed by the Committee for Security and Cooperation in Europe (CSCE) at their summit in Helsinki in 1975 and Vienna in 1989 contained the following formulation under Chapter VIII, Equal Rights and Self-determination of Peoples:

"By virtue of the principle of equal rights and self-determination of peoples, all peoples have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference and to pursue as they wish, their political, economic, social and cultural development." (VIII/2)

Thus, the most significant changes to the rights of peoples had been set forth. For one thing, peoples which found themselves in a state of colonial dependence or under foreign rule, but also ethnic minorities as well, in so far as they are identified as peoples, were, for the first time, given the status as subjects of the rights of peoples, thus giving them the same rights as states enjoy. And furthermore, the territory of that people was granted a special status in relation to the sovereign areas of the "administering" state. In the words of the Declaration of Principles:

"The territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."

The rights of peoples are expressed in the duty of all states to "refrain from any form of violence which... denies people their right to self-determination, freedom and independence." The Declaration of Principles also ensures all peoples the right to "give assistance to and help maintain" any resistance to such forms of violence. Furthermore, nothing is said with regard to the form or means of this resistance but the goal and content of self-determination are dealt with in one significant passage: "The establishment of the sovereign and independent State, the free association of an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

This sentence clearly justifies a people's right to secession. Even though UN General Assembly resolutions are non-binding, they nonetheless affect the image and status of states which suppress such rights.

It is unmistakable that this development of rights was only made possible by the pressure of decolonisation struggles and the expanding of the ranks of the UN, after states which had recently gained their independence became members. But it was also perfectly clear at all times that the right to self-determination did not just apply to peoples living under colonial dependence or foreign rule, but rather to all peoples, even those seeking to gain an independent state. In the Namibia Advisory Opinion, the International Court of Justice had affirmed that: "The subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principles of self-determination applicable to all of them".<sup>8</sup>

In the UN Declaration on Friendly Relations of 1970, it is stated that the right to self-determination is applicable not only to peoples under colonial rule but also to peoples subject to foreign or alien domination.

## 5.2 Contents of the right to self-determination

In order to realise the right to self-determination or even to separate from one state and form a new state or to integrate into another state, the question arises as to what possibilities are provided for under the fundamentals of "territorial integrity" codified in Article 2 section 4 of the UN Charter. The



Declaration of Principles deals with the conflict between these two fundamental principles and arrives at the following conclusion:

"Nothing in the foregoing paragraphs shall be construed as authorising 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 possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every state shall refrain from any action aimed at the partial or total destruction of the national unity and territorial integrity of another State or country."

The first passage clearly refers to peoples in a sovereign state and it denies them the right to separate from that state in cases where their self-determination and equal rights are guaranteed.<sup>9</sup>

In this instance, self-determination refers to the classic areas of autonomy such as language, culture, religion and traditions, things which are necessary to maintain the identity of a people. If these are protected in a multi-ethnic state, then the principle of territorial integrity is given priority above the right to self-determination in the form of secession.

Often the opinion is expressed with regard to this that all secessionist and separationist aspirations by national minorities are excluded from the general realm of the right to self-determination.

In Article 27 of the International Covenant on Civil and Political Rights of 1966, ethnic, religious or language minorities are only granted the right to their own culture, the ability to practise their religion and the right to speak their own language. But the Kurdish people, for example, need not stay limited to such a definition of minority status, even when the issue here is only one part of Turkish territory.

Such peoples can only be denied their right to self-determination in the form of secession if they enjoy the status of autonomy within an existing state. As already stated above the fundamental principle which guarantees all peoples the right self-determination is inalienable (*ius cogens*). The only doubts concerning this right could be, for example, whether the claims to autonomy should be expanded to a desire of secession or if they should remain limited to the protection of cultural, language, and religious freedoms. This must be decided depending on the concrete circumstances.

The second sentence in the quoted passage concerns third-party states and it prohibits them from any activity which might bring about the collapse of a state or aid in a secession. This matter is already addressed by the general principle of non-intervention and the only question here is what is meant by supporting a people who are waging a legitimate struggle for their self-determination (independence).

The UN and the OAU have always rejected secessionist demands from peoples not under colonial or foreign rule. The examples of Katanga, Biafra, and Eritrea are proof of this. Behind this rejection lies the fear that the entire state system might become destabilised and splintered. To this must be added the consultations in San Francisco, which at that time did not include secession in the definition of self-determination. But this view changed over the next few years, and the declaration of principles of 1970 granted priority to secessionist demands over territorial integrity in certain cases.

The state practice of the Federal Republic of Germany of recognising the states which separated themselves from the Soviet Union, as well as the early recognition granted to Slovenia and Croatia, proved that there are situations where minority peoples can be granted the right of self-determination even in the form of secession. Such a situation, according to UN commentator Aureliu Christescu, arises, for example, when "peoples, areas, or entities are joined together in ways which are damaging to peoples." <sup>10</sup>

Karl Doehring recognises a right to secession "when the ethnic group is handled by the ruling state violence in such a manner that there are clear evident violations of human rights, such as summary executions or unlimited prison detentions without trials, the tearing apart of families, dispossession without consideration of minimum existence levels, or the banning of a religion or language and the enforcement of such bans with brutal means".<sup>11</sup>

A reference to Article 1 of the Declaration of Human Rights of 1966, which includes the right to self-determination, with other forms of human rights protection, supports this interpretation of the right to secession as being the ultima ratio of protection in the face of massive human rights abuses.

### 5.3. The means to realize the rights of self-determination

Another question to be examined is what means are allowed in seeking and pushing through the peoples' right to self-determination. More specifically, whether the ban on violence in Article 2 Section 4 of the Charter is applicable in such situations and whether the accusations of terrorism are justified.

It took some time before the UN General Assembly expressed any opinion regarding the means of liberation struggles and the question of violence, but a definitive position on the matter was clearly expressed in public some time ago. Firstly, the reality of the liberation struggle and its protagonists, the liberation movements, must be examined to arrive at their legal status in relation to the colonial power. In 1972, on the recommendation of the OAU and in consultation with this body, the liberation movements in Angola, Cape Verde, Guinea Bissau and Mozambique were recognised as the "authentic representatives of the genuine aspirations of the peoples of those areas".<sup>12</sup>

In the following years more were added, including the liberation movements in Namibia ( SWAPO), South Africa ( ANC, PAC), and, in consultation with the Arab League, the PLO. Therefore, a formulation was now presented that these were the authentic representatives of the people themselves. The liberation movements were granted observer status in the United Nations and from 1974 to 1977 they were invited to attend important international conferences, such as the UN Secretariat Conference and the Vienna Conference concerning the Humanitarian Rights of Peoples in Armed Conflicts, and they were allowed to sign the conventions.

What is still disputed, however, is what right the liberation movements are to be afforded if they have not yet been recognised by the OAU or the Arab League, or the UN. The basis of such recognition is the people's right to self-determination and the conviction that the liberation movements represent the people; in other words, the demands they formulate and represent are legitimate and accepted in their representation. It goes without saying that such movements must have an apparatus which is capable of establishing the necessary contacts and diplomatic relations. Another important factor is the fact that the organisation is involved in an armed struggle in which neither the intensity (of the conflict) nor the control of territory play any role.

In any case, international status for the subject of the rights of peoples carries with it several rights and responsibilities, which stem from the goal of founding an independent state. In other words, liberation organisations have control over just a limited status as the subject of the right of the people, something which is later expanded to a fully fledged status with the foundation of a state. Only when a state is actually founded will this status be expanded, making the subject of the rights of peoples a sovereign state. It is debatable whether the recognition of a liberation movement by the UN has a constitutive or merely declaratory character.

Recognition, however, brings with it several advantages in international relations. These include protection against accusations of being mere rebels in a civil war by being represented at international conferences, as well as receiving material aid from third party states. But it is not even necessary to be recognised to be granted the status of combatants in a military conflict.

A liberation movement need not be recognised by a regional organisation (OAU, OAS, Arab League, CSCE) or the UN in order to be protected under the rights and duties of the 1st Protocol to the Geneva Convention of 12 August 1949, Concerning the Protection of the Victims of International Armed Conflicts, which was ratified on 12 December 1977. A unilateral declaration is sufficient under Article 1 section 4 and Article 96 section 3. According to my information, the declaration submitted by the PKK on 21 January this year has been accepted by the Committee of the International Red Cross in Geneva.

The international character of these armed conflicts is just as little dependent upon the recognition of the liberation movement by the UN as is the right of that movement to issue a unilateral declaration of its responsibilities under the Protocol, as is stated in Article 96 section 3 of the 1st Protocol:

"The organ which represents a people and which is involved in an armed conflict against a higher party in accordance with Article 1 section 4 is obliged to adhere to this Protocol during the conflict in

so far as it is a unilateral declaration concerning the agreement. After entering into this agreement, the following become applicable in the conflict:

- a) the agreement and this Protocol become applicable without exception for the entire organ in its role as a Party involved in the conflict;
- b) the said organ takes on the same rights and responsibilities as the higher party in the agreement and this Protocol;
- c) the agreement and this Protocol are equally applicable to all parties involved in the conflict".

Regardless of whether these prescriptions are an indication for or against an original, albeit partial, subjectivity of liberation movements with respect to the rights of peoples, the liberation movement can apply fundamental rules of the humanitarian rights of peoples for its fighters by making a unilateral declaration of combatant status. This is significant with regard to making distinctions between guerrilla fighters and civilians, for which a compromise is reached in Article 44 of the 1st Protocol, and for the protection from violence, repression, etc., for guerrilla fighters in captivity.

#### 5.4. The conditions of a legitimate liberation struggle

With the inclusion of liberation struggles under the humanitarian rights of peoples in the 1st Protocol, another contentious discussion was raised: the question of the use of force. If a total ban on the use of force by states is applicable under Article 2.4 of the Charter of the United Nations, then according to general opinion an exception of this ban exists today in the case of liberation movements.

The UN General Assembly had a long and difficult time dealing with the recognition of this exception especially since the Western states - the majority of the old colonial powers - strictly reject the right of liberation movements to use force. In session XXV in 1970, the UN General Assembly for the first time spoke of "the inherent right of all colonised peoples... to use all the necessary means at their disposal to struggle against the colonial power which oppresses their striving for freedom and independence".

7

[footnote7]: c.f. UN General Assembly Resolution 2708 (XXV), 12 Oct. 1979, passed by a vote of 73 in favour, 4 opposed and 22 abstentions.

Three years later, an explicit recognition of the right to wage armed struggle was passed by the UN. A series of resolutions passed by the UN General Assembly legitimized the use of force in armed struggle. The most significant of those resolutions was passed in December 1973, despite resistance from 13 Western states. Entitled "The fundamental Principles of the Legal Status of Combatants who Struggle Against Colonial or Foreign Rule as well as Against Racist Regimes", the resolution stated:

1. The struggle of the people under colonial or foreign rule or under a racist regime to gain their rights to self-determination and independence is legitimate and in full agreement with the principles of the Rights of Peoples.

2. All attempts to suppress the struggle against colonial or foreign rule or against a racist regime are incompatible with the Charter of the United Nations, the Principles of the Rights of Peoples, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, the Universal Declaration of Human Rights, and the Declaration on the Granting of Independence to Colonial Countries and Peoples, and such attempts pose a threat to international peace and security."<sup>13</sup>

One year later, the UN General Assembly passed the well-known Resolution on the Definition on Aggression without a vote by consensus which in Article 7 clearly absolves the liberation struggle of the notion of aggression:

"Nothing in this Definition, and in particular Article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and to receive support, in accordance with the principles of the Charter and in conformity with the above mentioned declaration."<sup>14</sup>

Even if, as was stated earlier, UN General Assembly resolutions are not legally binding, they still give a general indication of the development of the rights of peoples, based on the practices of states and the degree to which they adhere to the law. The resolutions were all passed by a sizeable majority of

the member states. In addition to these, there have been several more resolutions which have called upon states to provide "all the moral and material support possible" to peoples struggling to achieve their rights to self-determination and independence. From this, it is possible to conclude that the overwhelming majority of states consider armed struggle by liberation movements to be legitimate and in accordance with the rights of peoples.

### 5.5 Distinguishing "International Terrorism"

But this position is put in danger when it becomes mixed up with discussions which seek to distinguish international terrorism from the rights of peoples. For example, up until very recently, the media described the PLO as a terrorist organisation, although it had already been recognised in the 1970's as a liberation movement and, as the UN's official representative of the Palestinian people, the organisation had been granted observer status in the UN.

Since the beginning of the 1970's, when the UN began to deal with the question of terrorism more seriously after a series of hostage takings, hijackings and attacks on individuals, there has been a real danger that means of struggle provided for in war under the rights of peoples might be disqualified as terrorism if it was not possible to draw a line of distinction between these two forms of violence. Although the UN, by means of an ad hoc commission, managed to pass a resolution spelling out a clear difference between terrorism and liberation struggle, it is no surprise that the resolution received far more negative votes and abstentions than did the resolution passed one year later concerning the question of violence employed by liberation movements.

In 1973, the ad hoc Commission presented the majority opinion concerning the difference between the legitimate violence of national liberation movements and terrorist violence with the following words:

"Peoples which are struggling to free themselves from foreign oppression and exploitation have the right to use all means at their disposal, including violence. It should be noted that the commission does not consider all acts of violence, regardless of their aims or motivations, in the general concept of international terrorism. Acts committed by people who are citizens of states which are at war and who are waging resistance against the aggressor in an occupied territory or who are struggling for their national liberation, cannot be considered acts of international terrorism. In contrast to this, however, acts carried out by a single state against a people with the aim of crushing their national liberation movement and breaking their resistance to the occupying force are genuine manifestations of international terrorism in its broadest sense." 15

Section 4 of the UN General Assembly Resolution passed that same year, entitled "The Prevention, Persecution and Punishment of Acts Against Persons and Diplomats Protected by the Rights of Peoples", clearly expresses the notion that the legitimate right to self-determination and independence should in no way be hindered.16

Even if several questions regarding the combatting of terrorism and the legal prosecution of terrorists with respect to the rights of peoples remain open today, it is noneless without doubt that the use of violence by national liberation movements - in so far as it remains within the boundaries of the humanitarian rights of peoples established by the Hague and Geneva Conventions - is permissible and has nothing whatsoever to do with terrorism.

But that means that violent acts which exceed these boundaries, such as the hijacking of civilian airliners, the assassination of civilians and other crimes as defined in international agreements, are not legitimized by the national liberation struggle. Such acts are illegal and punishable, even if they are carried out by a recognised liberation movement. On the other hand, individual acts of terror, which are always possible within liberation movements, do not criminalise the liberation movement as a whole, as the history of the PLO will prove. It should be noted, however, that acts of terror are not solely the speciality of liberation movements, but rather they also have their origins in state activities. The notion of state-terrorism is unfortunately well-known around the world.

The United Nations Charter makes only two exceptions to the absolute ban on violence: the right to self-defence in Article 51, and the necessary measures of the UN Security Council in Article 42. The further exception in favour of the liberation movements represents a significant further development of the rights of peoples, and the "launch of armed conflicts in which peoples are struggling to exercise their right to self-determination against colonial rule, foreign occupation, or a racist regime," (Article 1

Section 4 of the 1st Protocol of 1977) has been taken up in the regulations regarding the humanitarian rights of peoples for international wars and conflicts.

Coming to a brief conclusion, we can emphasise that the demand for self-determination and the protection of human rights is legitimate and within the same concept of international principles of individual and collective rights of the peoples embodied in both of the International Covenants of Political and Social Rights of 1966/76. These demands can be achieved in rather simple forms of autonomy with the recognition of language, religion, culture, and education, or - in case of permanent violation of the basic human rights can go further to the demand of secession from the old state to build a different state on their own. The means of the struggle for self-determination depend on the willingness of the ruling government to deal with the demands, to really recognise the rights of the peoples and to acknowledge a peaceful co-existence of peoples. The more reluctantly, or even negatively, the government reacts the more violent the methods of the struggle can become. It is not the people's longing for peace and self-determination that disturbs peaceful co-existence in a state, it is the government denying the reality of different peoples and their human rights.

#### 5.6. The consequences

It follows from this explanation that according to the norms of international law Abdullah Öcalan should not be brought before a criminal court in Turkey and convicted and punished on charges of high treason, separatism and various crimes of murder. The conclusions in respect of the criminal proceedings against the PKK President, Abdullah Öcalan, are obvious if one accepts, as do international human rights organisations and independent experts, that the Kurdish people in Turkey were refused any exercise of the right to self-determination by means of systematic repression, forced assimilation and the policy of genocide, and that the armed struggle under the leadership of the PKK was legitimate in the meaning of the UN Charter and of the humanitarian international law of war. From this follows: neither guerrilla fighters, nor commanders, nor PKK politicians, nor the President fall within the competence of the national criminal prosecuting authorities of Turkey. Rather, they are prisoners-of-war. For this reason, the verdict of the Ankara State Security Court can have no standing in international law.

What this would mean in practise should be explained here briefly, even if at present I see little prospect of this legal standpoint being successful before the European Court of Human Rights or any other court.

Bearing in mind this restriction the definitive rules for those who have participated in, or have been affected by, armed conflicts can be outlined as follows:

combatants who have fallen into the hands of an opposing party to the war, are prisoners-of-war and should be treated as such. According to Article 43 of the 1st Protocol, military combatants are members of the military forces of a party to the conflict; the whole of the organised armed formations, groups and units subordinate to a leadership and responsible to the representative body of the party are military forces in the meaning of the Convention; this applies even if the body is not recognised by the opposing party.

for combatant status it is today no longer necessary that those involved belong to a regular army. Members of organised armed resistance movements are also combatants if they meet certain minimum conditions laid down by Article 4 paragraph 1 No 2 of the Geneva Convention of 1949 taken in conjunction with Article 44 paragraph 1ff of the 1st Supplementary Protocol of 1977. Under Article 44 paragraph 3 the obligation to distinguish combatants from the civilian population today essentially rests on the requirement that they must have been seen to be carrying weapons at the start of an operation and also immediately before the attack. But even when this is not the case (as with guerrilla fighting methods), combatant status can still in any event be claimed (Article 44 paragraph 4) and is still valid independently of any earlier conduct in an attack, if the person concerned is taken prisoner while he is not taking part in an attack (Article 44 paragraph 5). Over and above that there is always a presumption in favour of allowing combatant status if someone who has taken part in hostilities claims P.O.W. status and especially if they appeal to a protecting power (Article 45 paragraph 1) such as the International Red Cross.

So actual participation in an act of war at the time of capture is not decisive. It is also not necessary for the person concerned to have personally participated in acts of war. It is however essential that he be a member of an organised armed unit at the time of his capture.

If someone who falls into the hands of their military opponent is not treated as a P.O.W. but is nevertheless subjected to criminal proceedings by the courts for a crime committed in connection with the hostilities, he is entitled to assert his status as P.O.W. before the court and thereby to bring about a decision of the court on the point. The other practical consequences can be briefly summarised here:

1) the prisoners in question may appeal to the International Committee of the Red Cross in Geneva as a protecting power in the meaning of international law (Article 45 paragraph 1 of the 1st Supplementary Protocol).

2) the prisoners could assert their right to special conditions of imprisonment in accordance with the 3rd Geneva Agreement of 1949 (Article 17), i.e. in practice demanding to be imprisoned together and to have freedom of communication, considerable freedom of movement and the right to receive information, as well as to be represented by trusted people whom they have chosen, even in case of prosecution for and conviction of a crime (Article 85 of the 3rd Geneva Agreement).

3) the prisoners could cite the formal guarantees of due process of the 3rd Geneva Agreement - e.g. investigation to be no longer than 3 months, discharge in the case of serious illness, ban on isolation, court procedures to be conducted according to legal norms, established guarantees of the defendant's legal rights, requirements of the defence, etc. etc.

4) substantive prosecution would only be admissible at all in the case of accusations which are not covered by the law of war (admissible acts of war) c.f. Article 22ff of the 4th Hague Agreement of 1907 and Article 48ff of the 1st Supplementary Protocol. Apart from this, collective punishments for the acts of individuals are forbidden.

It remains the task of Öcalan's lawyers from Turkey, (or, because of the difficulties and threats of prosecution if they make these points publicly, of the international defence team) to bring these points out clearly and comprehensively in the human rights complaint to the European Court and to argue for them in the public debate.

This is still true, as I mentioned at the beginning, if in the meantime one considers, as the PKK leadership clearly does, that the armed struggle is historically outdated. Before I finally look in more detail at this new assessment and its consequences, here, in abbreviated form, are some of the conclusions drawn from what has been said so far:

1. Modern international law legitimates the struggle of the Kurds for the right to self-determination. The concrete form of this - separate state, part of a federation or of a union of states or mere autonomy in certain areas - depends on the concrete conditions and the wishes of those concerned.

2. The armed struggle itself, including in the form of guerrilla warfare, to achieve the right to self-determination is justified on condition that other peaceful means are not possible, and classed as a legitimate national liberation struggle against colonial oppression when the organisation leading the struggle represents a majority of the population and has a corresponding organisational structure.

3. This legitimisation cannot take place via the judicial system or even be pushed through forcibly against the will of the state concerned, since a court of higher instance, on the model of an international court, which oppressed nations could appeal to, does not exist. Participation at the United Nations as a rule only applies after a successful liberation struggle, since only states can be voting members with seats; partial exceptions are national liberation movements with a strong international lobby to whom observer status was granted before they took power (PLO, ANC etc.)

4. Independently of this, the recognition in international law of the right to self-determination does give a certain political and moral weight to the Kurds and their representatives in the eyes of the international community and of N.G.O.s, worldwide and especially European; this could be translated into concrete demands with the aim of strengthening their position:

an international Kurdistan Peace Conference or, prior to this, parallel to it, or following it, a war crimes tribunal;  
obtaining observer status in all important international bodies.

5. The partial autonomy with state-like character in South Kurdistan/Northern Iraq, forcibly brought about by the US and guaranteed by the UN, constitutes a special case: it corresponded to a special historical situation at the end of the Gulf War, in which the Kurds had first been encouraged to rise up, and to the specific interests of the powers waging war against Iraq, and therefore the example cannot be extended to other countries. In particular the circumstances cannot be applied to Turkey, since in contrast to Iraq, Turkey is a partner in NATO and is supposed to play a particular role as regional power according to the strategic ideas of the US, and therefore Turkey is supposed in contrast to Iraq, to be being strengthened, not weakened.

6. New assessment of the situation of the Kurds in Turkey by PKK President Abdullah Ocalan; ("Project for Democratic Union within Turkey") and the possible consequences in international law.

Now, I shall take a look at these important new developments since they might make it appear that, at least for Turkey, a part of the consequences may have been outdated (as I mentioned at the beginning).

Because some important programmatic points of the decades of struggle by the PKK (for a free and independent Kurdistan) are being presented as having been historically outdated and replaced by the concept of a democratic Republic of Turkey with a Union of Turks and Kurds. Certainly it is often emphasised by Kurdish people close to the PKK that we should not see any turning away from the previous struggle; Ocalan has declared via his lawyers that he is still the "old President Apo"; no-one should "argue about some unnecessary details or come to grief over a few phrases (quoted in Ronahi, June 1999, p.4). From Kurdish intellectual circles we hear the interpretation that it's a question of "Middle Eastern politics", where your real meaning is never openly expressed; we must pay attention to the context and the interlocutors (the rulers of Turkey). But such observations seem to me to be an attempt to square a circle. They have been overtaken by real developments:

Not only have the political line and its implementation by the PKK leadership, after initial hesitations, (c.f. the first statement of the Presidential Council after Ocalan's arrest that his statements would no longer be binding on the PKK) kept strictly to the President's instructions from the prison island of Imrali;

Ocalan's announcement, which surprised many people, that the "armed struggle in Turkey would end "on 1st September (statement of Ocalan via his lawyers, quoted from a Kurdistan Information Centre press release of 3.8.1999) was accepted by all the main PKK committees shortly after and thereupon all the guerrilla fighters began to withdraw from Turkey; meanwhile his brother Osman Ocalan in his capacity as a member of the Presidential Council, publicly declared without anyone contradicting him, that the armed struggle is "ended for ever", and certainly both in Turkey as well as in other regions of Kurdistan ( in south Kurdistan against the KDP);

further, the demand in his defence speech for a new party programme on new principles to be worked out has been translated into action (see below). When I was preparing this article the resulting new programme was not available to me, so in what follows I shall rely on his remarks in his defence speech, which both outline present political , economic and social conditions in Turkey and its foreign relations, as well as giving a critical analysis and reappraisal of the PKK's previous programme and struggle, as well as a line of march for the future. Also for this reason his remarks deserve to be taken as seriously as I believe they were intended.

#### 6.1 The reappraisal of Turkey and her historical and political foundations and perspectives.

Just as until now, including in the PKK's programme which was still operative at the time of Ocalan's trial, Kurdistan was defined as an "international colony of four states" (summary formulation of Ismail Besikci) i.e. there was a colonial racist government based on Kemalist Turkish nationalism, against which the Kurds defended themselves in repeated armed uprisings (especially, the Sheikh Said uprising of 1925), and whose state structures needed to be renewed by means of a violent overturn - and from which facts the legitimacy of the armed struggle derived - so until now, it had the same meaning for Ocalan, typically as when talking about the historical context and the processes which led to the establishment of the Republic by Kemal Ataturk: it was a question of a war of national liberation and of a new stage in Turkish-Kurdish relations:

"The War of National Liberation and a New Stage in Turkish-Kurdish Relations"

"In both the last Assembly of Deputies and at the meetings and congresses led by Mustafa Kemal at Amasia, Erzurum, Sivas and Ankara, national liberation was clearly seen as a joint liberation effort by Turks and Kurds. This was not only the right and practical path, but also the one demanded by the historical notion of a common country and state."

"Having to contend with these and also with the followers of the old Ottoman Union and Progress movement and with Bolshevik influences, the leading power had to follow intense and different tactics. Add to this the extensive claims of ethnic Greeks in the West emboldened by the Greek attack on Turkey, and equally extensive claims by the Armenians in the East, and it was obvious that national liberation had to be based on the two fundamental peoples, the Kurds and Turks. If the two nations went their separate ways, and especially if they acted against each other, they would have ended up losing all they had. It is useful to explain some matters here which have not been gone into in depth: the national liberation movement was undoubtedly led by the Turkish side which was the one with the political and military experience and the developed national consciousness. Not only was this not opposed, it was expected. The Kurdish side found this natural and was not uncomfortable or anxious about being an auxiliary force under its command."

"One has to admire Mustafa Kemal and those leading the movement. It is a mistake to think of the Kurdish side as collaborators during this period. They did the right thing, but ...."17

It remains to point out that, as far as I can see, there is no condemnation of the Armenian genocide by the Ottoman rulers in the whole of the defence text. On Turkey to-day, and on his perspectives, Ocalan says amongst other things in his defence speech:

"If this historical reality is fully successful, it needs to be said in the last section of the indictment not that the PKK calls for a separate state, but that it very clearly calls for a democratic republic and is the founding force for such a republic. History may not state this very clearly today, but sooner or later it will do so. With the PKK, history is unearthed, corrected and also provided with a solution. Just as the Kurds were among the national forces during the struggle for national liberation in the 1920's, as we approach the year 2000, they have been a democratic force with the PKK, with all their correct and incorrect actions, and all the suffering and happiness it entails. This is not separatism but perhaps a move for the greatest union with Turkey and the Turks, a move towards strength and once again becoming a leader in the Middle East, the Caucasus and the Balkans. There is no way of achieving this other than through a free union. The PKK has also served to prove this. Nothing can be more powerful than reality and this is especially true for laws. To be not for separatism but for union at this historic crossroads for the PKK it is necessary to see and define this dominant aspect of reality."18

The future strength of Turkey as a leading power in the Middle East, Caucasus and the Balkans with the help of the "free union of the Turks and Kurds" at another point is said even to stretch as far as Central Asia: "It is certain when this, the most difficult problem in the republic is resolved, Turkey will, with the strength it receives from internal peace, be in a position to be a leading power in the region. Leadership in Middle East will imply influence from Central Asia to the Balkans and the Caucasus."19

Giving up the right to self-determination and the armed struggle.

It is true that in his defence speech Ocalan speaks of the historical need for the armed struggle and of its legitimacy in the past:

"The PKK's rebellion using its own methods, and leading the movement as a military force was legitimate. In 1990, it could have changed its approach from military to non-violent and it might have succeeded. If the 1993 unilateral ceasefire, which was declared by the PKK, had been accepted by the government, it would have been a turning point. After 1993, with the government's rejection of the ceasefire, violence increased on both sides and more destruction ensued. At times the violence moved beyond the conventions of war."

"The last 15 years can be described as a mid-sized war between the PKK and the state. It cannot be justified by a description of day to day actions. If PKK members acted outside the conventions of war, they were punished. We always adhere to this policy."20

But right at the beginning of his defence text the rejection of the principle of the right to self-determination is formulated.



"The right of nations for self-determination" which was fashionable in the 1970's, as which in practical terms meant establishing a separate state, was, in fact, a blind alley in this specific [context]. In the case of Kurdistan, it was obstructing the solution rather than solving their problem. In my practice, I have tried to surpass these [limitations]. When I saw in practice, how backward and sometimes even obstructive the alternatives such as establishing a separate state, federalism, autonomy and similar approaches were in comparison with the rich mode of solutions democracy offered, it became very important for me to concentrate on the democratic system. The gradual occlusion of the military approaches, that is the armed struggle, also has a share in this change of [directions] in our movement. Especially, given the traditional [Kurdish] uprisings where the rebellion-suppression cycle predominates, an approach that did not contain force and violence was urgently needed, not only in the Kurdish movement, but also globally."<sup>21</sup>

At another point, the criticism is even extended to the policies of the PKK, and its programme since the beginning of the 90's:

"It should develop a political programme based on the concepts of a democratic Republic and a common country, giving up the demands of the utopian period which are no longer the only form freedom can take and, in any case, no longer work and have been abandoned, and opt instead for the notion of free union; and it should render this programme official at a conference as soon as possible. Both sides can transcend the impasse only in this way. At a time when it is clear that the Republic has entered into a period of great democratisation as regards its social and ideological foundations, the PKK must abandon its programme influenced to a large extent by the socialist systems of the 1970's and the dogmatic approach to the reality of Kurdish-Turkish relations, and reach out to a programme of democratic politics in Turkey as a whole, and on a deeper and more detailed level, in Kurdish society itself. This will open the path to political-legal development and make it possible to transcend the impasse."<sup>22</sup>

And the rejection of the principle of the right to self-determination, which he formulated at the beginning (see above) is linked even more clearly in other places with the rejection of the armed struggle:

"The first of these is the principle of national self-determination. This principle was applied mainly in the nineteenth century and the greater part of the twentieth century. It was based on the idea of setting up a nation state. The ideology it subscribed to was nationalism. The method it employed was mainly armed struggle and national wars of liberation. It was seen that it had a limited application, but led to great bloodshed and its extreme nationalism engendered long-lasting enmities."

"There are of course historic reasons for all this as well. To put it in very general terms, in both religious wars and wars arising as national and social wars or in revolutions and counter-revolutions, there has been massive bloodshed and there are no major problems left that can be solved through bloodshed, or at least there are very few. In general, the path followed by democracy is that of evolution and peace. This is an historical fact. Democracy moves forward on the legacy of suffering left over from the recent and distant past. Its claim is that there have been enough revolutions and counter-revolutions and it is interested in a method that offers more solutions and offers more development and could be termed more civilised, and it is interested in the social, political and philosophical standards associated with this."<sup>23</sup>

The rejection of the principle of self-determination and the legitimate national liberation struggle including in its armed form cannot be expressed more clearly.

### 6.3 The "Democratic Project"

The concrete perspectives are only displayed in a few places so, for example:

"What is left is economic. The GAP project is a good beginning. Turkey's goal of reaching an historic democratic republic will be achieved. Under this formula there will be no reason for rebellion."<sup>24</sup>

Portraying the GAP Project, of all things, as a good beginning to the democratic union of Kurds and Turks must have amazed previous critics of this huge project which is destructive to the environment and is being carried out on the backs of the Kurdish rural population...

The removal of obstacles to quote the "use of Kurdish language and culture," considered here as an important historic turning point, is elsewhere formulated expressly as three theses of the "democratic union solution" under the heading: "The right of the Kurdish people to language and free cultural expression is the essential core of the problem." So, amongst other examples:

"In the meantime the biggest obstacles are the barriers which exist to speaking the Kurdish language and recognition of Kurdish cultural rights. These elements have not been clarified and this has made the Kurdish problem more complex."<sup>25</sup>

The demand for recognition of the Kurdish language as an official language, or as a language of education, for example, is also expressly not raised - the heart of the Kurdish problem is reduced to the use of the Kurdish language and the recognition of the culture in public, with particular reference to other states where this is customary.

"The state noticed this matter, and as of 1990 they permitted certain positive steps to be taken, such as broadcasting in Kurdish, lifting restrictions on the language, and permitting the foundation of Kurdish institutes. The function of the folklore associations is part of these positive steps. If these kinds of organisations are even slightly encouraged by the state, with their educational functions, they will contribute a great deal to the solution of the Kurdish problem. One of the main deficiencies is the extent of illiteracy. There is no prohibition in the Constitution about reading and writing. It is only a matter of resources and education and these problems can easily be overcome. Setting up pre-schools, institutes and permitting the learning of Kurdish history and the Kurdish language at the universities will contribute a great deal in resolving the Kurdish problem. These privileges already exist in other countries. In the age of technology it is not easy to forbid them. The same thing is valid for radio and TV. Freedom in these areas is the most important element to a solution of the Kurdish problem."<sup>26</sup>

Didn't exactly this motto serve for years in the PKK as a prime example of the betrayal of the KDP leadership of the Kurdish question: that during Saddam Hussein's regime's gas attacks on Halabja one could hear Kurdish music playing on regional radio broadcasts?

#### 6.4 The Transformation of the PKK into legal democratic parties

Under the heading of point 5: "All illegal organisations, and first and foremost the PKK, must adapt themselves to the normal political and legal methods within a peaceful legal framework." We read, inter alia: "When a halt is put to armed conflict, all the illegal organisations so far will have to reinvent themselves in a democratic system. Especially under a general amnesty, when legal and political means of expression are respected, democratisation will take a stronger hold. In the nineties, there was progress on freedom of assembly."

"As late as it might be, the PKK will have to seek peace in its own capacity, rejecting the insistence on violence. It will be more effective in this endeavour as the state responds positively to the above-mentioned approaches. If practical opportunities come about, especially with the state's tacit approval a new "Peace Conference and Congress" will have to prepare for such an eventuality. There would be increased efforts towards such a solution in the region, as well as in the world. Those who reject a democratic solution and peace will find themselves in isolation."<sup>27</sup>

In the transformation of the PKK into an "ordinary legal political" party, the question is posed of its historical role and legitimacy given the existence of a democratic party, such as the pro-Kurdish HADEP. A formulation in another place even comes close to saying that the PKK President himself is pushing for the dissolution of the PKK as a Kurdish organisation:

"We say that creating separate organisations to solve the Kurdish problem is unnecessary."<sup>28</sup>

In summary, we have established the following: if one looks at these historical and political deliberations as a whole, it becomes clear that not only their earlier revolutionary principles must be given up once and for all but also the principle of the right to self-determination as being historically outdated. What remains is the right to the use of their own language and culture in the private and semi-public realms. In Öcalan's concept of the "free Union" of Turks and Kurds within the democratic Republic of Turkey and of its strengthening as a leading regional power from the Balkans to Central Asia, little room is left for an independent role for the Kurds. Rather, their role would be reduced to

"feeling happy from acting as a helper under Turkish command", as in Mustafa Kemal Ataturk's time.<sup>29</sup>

If one accepts this concept, the contribution of international law is reduced to a very subordinate role: securing the cultural rights of a minority on principles as laid down in the above mentioned UN statements and decisions, and OSCE documents. But what was said above remains true even for the realisation of these minority rights: no international court for achieving these rights exists, not to mention the fact that the Kurds and pro-Kurdish parties and human rights organisations in Turkey lack the so-called active legitimacy which would be needed for them to be able to accuse Turkey, or to force through the implementation of such democratic principles via international courts and bodies.

In this case, at the end of the day all that remains is the possibility of the exertion of political influence, in which one can of course refer to the principles of international law in order to help gain legitimacy.

So, my observations militate against light-mindedly assuming that the political struggle for democratic rights could be so readily accomplished without very radical changes to society and the constitution of Turkey.

#### Possible consequences

It remains to be seen whether, and how, this new concept can be put across within the PKK, and amongst the Kurds, and whether there is a real chance that it can be implemented. Certainly, in the last few months, there have been a series of positive signals from Turkey, amongst which are:

a public debate about a political solution even in parts of the media which are close to the Turkish state and among all political parties;

wider use of the Kurdish language and of independent Kurdish media has been promised and has begun to be tackled in a partial way;

the demand for changes to the constitution has been raised by a senior Turkish judge amongst others; the President of the Republic receiving the Kurdish HADEP mayors, etc. But these are at best positive signals of the same sort that there were in the past (views expressed by the late Prime Minister Özal; elected Kurdish mayors being received by government representatives, etc.,) but conversely, just as before, there is also a shocking list:

confirmation of Abdullah Öcalan's death sentence by the Court of Appeal, and little likelihood of parliament refusing to have the sentence carried out;

clearly, there were no negotiations between the Turkish state and the Kurdish side, at least up until August 1999, otherwise you could not explain why the PKK President complained to his lawyers that there is no official contact for the handing over of weapons.

Guerrilla fighters withdrawing from Turkey are being attacked by the armed forces and no one, particularly no international body, feels called upon to monitor the peace process on the spot or to control it, or even observe it;

the balance-sheet of human rights abuses has not changed in the last few months in Turkey;

the Amnesty law has turned out to be just a law of immunity for corruption and for mafia gangs and thereby supplements the legal instructions giving immunity to torturers;

from the summer of 1999 there was a new line for the Turkish media, which one could see as a reply to the key demand for making room at least for cultural rights; according to this, the media is not even allowed to call the KDP which collaborates with the Turkish authorities a "Kurdish party". It can only be referred to by phrases like, the "Barzani clan";

in August 1999, new international arrest-warrants were issued against all the members of the Kurdistan Parliament in Exile in Europe.

There is a small consolation however: it is being announced at the Foreign Office in Berlin that Turkey's membership of the European Union (Turkey is to be made an official candidate member in the autumn) is to be made unequivocally dependent on human rights and the rights of the Kurdish minority in Turkey being guaranteed. The constitution must be changed for this, for which German expert jurists are being offered; in the internal situation reports on Turkey, the concept of "Kurdistan" will be popping up. Little consolation also, since it is being reported from the same quarter that it is impossible to gauge the developments within the PKK and that one must wait and see what happens.

This is no surprise, and brings me to a clear warning to be addressed to the PKK: without a broad democratic and publicly comprehensible debate over the future programme and politics of the PKK -

including with the critics in its own ranks - (which there must be, given the above-demonstrated revision of fundamental principles), perhaps the new line could be carried through from above by authoritarian methods, but a new course imposed from above could not be seen - at any rate by possible negotiating partners and supporters amongst the democrats in Europe - as a reliable way of behaving. People are far more likely to wonder whether an equally surprising turn may occur again shortly, whether through new insights by the PKK President, one of his successors, or through other events.

A completely different approach is found in the programmatic speech given by Prof. Serif Vanli, President of the Kurdistan National Congress (KNC), at the 12th Annual Congress of the Kurdish National Congress of North America on 30 July 1999. He began with the relevant events since the abduction of PKK President Abdullah Öcalan by the agents of various secret services; made an assessment of the debate in Turkey and elsewhere in the world over the solution to the Kurdish problem, and sharply opposed the categorisation and criminalisation of the Kurdish liberation struggle as "terrorism". He came to the following conclusion:

"Bound by the KNK Charter, but also in full harmony with my personal conviction, I have to proclaim, here too, from Michigan, the right of the oppressed Kurdish nation to self-determination, including the creation of an independent and unified Kurdistan. To be independentist is not a crime of shame, but a right, and this right is natural and imprescribable. Nobody, no man, no political party, whoever or whatever they might be, Kurd or not, no Kurdish generation can renounce, can sell, or mortgage this right to the detriment of future Kurdish generations."

(p. 3 f.)

"To come back to the field of political reality, there are rumors about a kind of deal being discussed behind the stage. We hear, or read, in the international mass media the "the Kurdish minority" in Turkey should be granted some cultural rights".

(p. 4)

"If what is apparently being discussed regarding the Kurds in Turkey may consist in such measures as the lifting of the State of Emergency in a number of Kurdish-inhabited provinces, the disbanding of the so-called "village guard" units, the liberation of political prisoners such as Hatip Dicle, Ismail Besikci and Leyla Zana, the return to their villages of the Kurdish rural population forced into exile into western and central Turkey, then such measures should be welcomed - welcomed as preliminary steps toward a political and democratic solution. They cannot be by themselves the solution to the pending question, but a prelude to a peaceful dialogue for the construction of a future. The Kurdish people, the Kurdish guerillas, have not fought for fifteen years just to go back to the starting point, that is, the zero position. Furthermore, a peaceful solution to the conflict between the KDP and the PKK should be attained. That is why in the letter to the Secretary-General of the United Nations, Mr. Annan was urged to make use of Article 99 of the UN Charter and bring the question to the attention of the Security Council. An international conference on the issue, under the aegis of the international organisation was demanded.

The right of all peoples to self-determination implies several political options, one of which is full independence. Another one may be federalism. But federalism cannot last and is meaningless without the practice of a true democracy - not just in words, or limited to one nationality in a state inhabited by two or more nationalities as in Turkey and the other states dividing Kurdistan. Concerning these states, federalism requires imperatively and primarily a constitutional reform, that is, the recognition by the Constitutions of these states of the existence of the Kurdish people as a distinct people within their boundaries, and as a partner of the neighbouring peoples, equal to these in rights and duties".<sup>30</sup>

"Turkey, with more subtlety than Saddam, is committing ethnocide in Turkish Kurdistan."<sup>31</sup>

"The KNK leaves the options open as to the political solution to the Kurdish question. We consider however, with favour, federalist solutions, in the light of a just comprehension of common interests between the peoples of the area. But a just comprehension of common interests should be mutual and based on collective equality and partnership."

"Furthermore, if the Turks want to continue to consider Mustafa Kemal as their "father" (Ataturk), it is their affair, but Mustafa Kemal can by no means be "the father" of the Kurdish people. The Kurds have their own millennial history and do not need any father."

"The Kurds prefer a hundred times over, peace to war. Yet peace should be qualified: it should be a just peace. But if we have no choice, the Kurds are ready to fight for their liberty, for their culture, to recover their dignity and their memory".

""We want to govern ourselves by ourselves in our own homeland, rebuild our country, and live in peace and co-operation with all our neighbours."32

So, this programmatic speech by the doyen of Kurdish academics, a leading figure in Kurdish studies who is also the President of the former Parliament in Exile and of the Kurdish National Congress (established in summer 1999), stands, as we see, in direct contradiction to the basic theses of PKK President Abdullah Öcalan, and of the PKK leadership, perhaps not so much in the practical political consequences for day-to-day democratic politics but more for historical and programmatic statements of principle which could be decisive in determining the line and orientation of the struggle.

To clarify once again with an important example: As the central outcome of the second extended sitting of the Central Committee of the PKK held between 23-29 July 1999 to decide the future strategy of the PKK, it was announced in a press statement:

"The support of the PKK for their President Abdullah Öcalan was also renewed and his appeal was supported. In the future, the party will make a new determination of its place within the New World Order, instead of fighting against the New World Order, it will assert its place within it, and continue its resistance with all political means". It was emphasised that the armed struggle was an outdated method and "even if the armed struggle had its justification and necessity, still the last 100 years show us that it has lost importance. In its place, political resistance has gained in importance" (...) Furthermore, it emerges from the statement that the hegemony of the USA and its "New World Order" will also have repercussions on a global scale and in the Middle East as well. Whatever forces offer resistance in the Middle East, sooner or later they will have to adapt themselves in accordance with this New Order".

In reference to the project of a "Turkish Democratic Republic," it is emphasised that this proposal for a solution is not a tactic but comprises a strategic concept. In this sense too, a new programme will have to be prepared and decided on at the extraordinary party congress. 33

So it seems logical when Osman Öcalan (a leading member of the Presidential Council) is quoted as saying that NATO, which is so fond of solving problems outside the borders of its member states, will "in the end turn its attention to its own problems internally, it (Nato) won't put up with all that any longer". An intervention by the USA in Turkey is not necessary, just as long as the Turkish state finally talks to "representatives of the Kurdish people".

It follows from my introductory remarks on the Nato war in Yugoslavia and the conflict in East Timor that I am strongly convinced that in the framework of the USA and NATO's "New World Order" that nations' rights to self-determination and the "human rights of minorities" are measured by a double standard and only allowed to those who can hope for a - to my mind dubious - involvement of the USA and NATO, and who are seen as "friends". The Kurds, and especially the PKK (still) do not belong in this category, in contrast with the Turkish and Indonesian governments. To shed the image of enemy and "terrorists", more would be needed than just to change the programme and to give up the guerrilla struggle. Still everything points to the fact that the Kurds, not just in Turkey and the neighbouring countries of Kurdistan, but also in their countries of exile, are being used as scapegoats.

Consequences of the above for our topic:

1) First of all, we cannot at present assume that Kurdish goals are clear to all and recognised on all sides. On the contrary, it seems that there are basic differences of programme and aims.

2) The function of international law is independent of the question of which goals one considers decisive - on the one hand because there exists a court whose decisions are binding for the implementation of international law, and on the other because there exists the danger that it may function as a political judicial system of the ruling powers of the "New World Order".

- 1 Zehn Jahre grenzüberschreitende Kurdenverfolgung, "Ten Years of Cross-border Persecution of the Kurds", Berlin 1998, page 93
- 2 (Press release No. 1 of PKK President Öcalan's international defence team, 8/1/99)
- 3 (Press release No. 4, 4/2/99)
- 4 Press release No. 5, 5/3/99)
- 5 (Le Monde 12/3/99)
- 6 Compare, amongst others, Norman Paech's contribution to the "International Peace Conference" at Lausanne held on 25/7/98.
- 7 c.f. Rosalyn Higgins, Problems and Process. International Law and How we use It, Oxford 1994, p.111
- 8 c.f., I.C.J. reports (1971) 16 para. 52.
- 9 c.f. Yearbook of I.L.C. (1988), ii. pt 2, p. 64.
- 10 c.f. Aureliu Christescu, "The right of self-determination: historical and current development on the basis of United Nations Instruments", in UN document E/ CN 4/ Sub.2/404/Rev. 1, p.87.
- 11 c.f., Karl Doehring, "The right to self-determination of peoples " in Bruno Simma (ed), United Nations Charter, Munich 1991, p.15 ff.,30.
- 12 c.f., UN General Assembly Resolution 2918 (XXVII), 14 November 1972
- 13 c.f. UN General Assembly Resolution 3103 (XXVIII), 12 December 1973, passed by a vote of 83 in favour, 13 opposed, and 19 abstentions.
- 14 c.f. UN General Assembly Resolution 3314 (XXIX), 14 December 1974
- 15 c.f. UN Doc. 6/418, p.7.
- 16 c.f., UN General Assembly Resolution 3166 (XXVIII), 14 December 1973.
- 17 (Ocalan: Defence, quote p22/23)
- 18 (Ocalan Defence, quote p35/36)
- 19 (Ocalan Defence, quote p117)
- 20 (Ocalan Defence, quote p96)
- 21 (Ocalan Defence, p12)
- 22 (Ocalan Defence, p47)
- 23 (Ocalan Defence, pp 55-57)
- 24 (Ocalan Defence, p 97)
- 25 (Ocalan Defence, p 93)
- 26 (Ocalan Defence, p 94)
- 27 (Ocalan Defence, p 97-98)
- 28 (Ocalan Defence, p 92)
- 29 cf. quote above from p 23 of English text of the Defence Speech
- 30 (p. 4/5)
- 31 (p.5)
- 32 (p. 6)
- 33 Kurdish Information Centre press statement of 9 August 1999