

# EARNING INDEPENDENCE IN IRAQI KURDISTAN

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## I. INTRODUCTION

The decision by the Obama administration to remove all U.S. troops from Iraq by the end of 2011 may have far more implications on the stability of the nation than questions of sectarian violence, the resurgence of the Ba'ath Party, or Al Qaeda.<sup>1</sup> The Arab Spring that swept the Middle East through Tunisia, Egypt, Libya, and Syria, to name a few,<sup>2</sup> could well spread to the relatively peaceful poster-child for the success of the Iraq War—Iraqi Kurdistan.<sup>3</sup> While the Arab Spring movement has remained subdued in Iraqi Kurdistan, where only a few lowly publicized protests have occurred,<sup>4</sup> the lack of U.S. military presence in Iraq could push the historically powerful Iraqi Kurdish secessionist movement forward.<sup>5</sup> While Kurdish government officials have made public assurances to Baghdad and Washington that Kurdistan does not seek secession, in practice, the

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1. See Michael S. Schmidt & Eric Schmitt, *Leaving Iraq, U.S. Fears New Surge of Qaeda Terror*, NY TIMES (Nov. 5, 2011), [http://www.nytimes.com/2011/11/06/world/middleeast/leaving-iraq-us-fears-new-surge-of-qaeda-terror.html?\\_r=1&hp](http://www.nytimes.com/2011/11/06/world/middleeast/leaving-iraq-us-fears-new-surge-of-qaeda-terror.html?_r=1&hp) (noting U.S. concern over ties between Al Qaeda and former Ba'ath Party members). See also Michael J. Kelly, *The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707, 709 (2010) (“Tensions remain high as of this writing, and political posturing will likely intensify as the date for withdrawal of U.S. forces nears.”).

2. See *Crescent Moon, Waning West*, THE ECONOMIST (Oct. 29, 2011), <http://www.economist.com/node/21534782> (noting political transitions in various regions in the Middle East).

3. Scott Peterson, *Arab Spring Crackdown Damages Kurdistan's Image as Regional Model*, CHRISTIAN SCIENCE MONITOR (July 1, 2011), <http://www.csmonitor.com/World/Middle-East/2011/0701/Arab-Spring-crackdown-damages-Kurdistan-s-image-as-regional-model>.

4. See *id.* (describing a protest that lasted sixty-two days, which resulted in the death of ten people).

5. See Kelly, *supra* note 1, at 709 (indicating Iraqi Kurdistan's confrontational stance on Baghdad may escalate upon removal of U.S. troops from Iraq). See also Sam Dagher, *Kurds Defy Baghdad, Laying Claim to Land and Oil*, N.Y. TIMES (July 9, 2009), [http://www.nytimes.com/2009/07/10/world/middleeast/10kurds.html?\\_r=2&ref-world](http://www.nytimes.com/2009/07/10/world/middleeast/10kurds.html?_r=2&ref-world) (“American diplomatic and military officials have said that a potential for a confrontation with the Kurds has emerged as a threat as worrisome to Iraq's fate as the remnants of the insurgency.”). See generally Andrew E. Kramer, *Iraq Criticizes ExxonMobil on Kurdistan Oil Pursuits*, N.Y. TIMES (Nov. 12, 2011), [http://www.nytimes.com/2011/11/13/world/middleeast/iraq-criticizes-exxonmobil-on-kurdistan-oil-pursuits.html?\\_r=1&hp](http://www.nytimes.com/2011/11/13/world/middleeast/iraq-criticizes-exxonmobil-on-kurdistan-oil-pursuits.html?_r=1&hp) (“With the American withdrawal imminent, concerns are mounting that ethnic tensions could again threaten stability.”).

Kurdistan Regional Government (KRG) and the Kurds in Iraq have been pushing towards increasingly greater autonomy.<sup>6</sup>

Most recently, in 2009, the KRG approved—but has not yet ratified—a draft of the Kurdish Constitution.<sup>7</sup> The KRG has promised Washington that it would wait to hold a referendum to vote on the ratification of the Kurdish Constitution.<sup>8</sup> A number of new states have emerged in recent years, begging the question of a future for Kurdistan. The emergence of an independent Southern Sudan in 2011 reignited the Kurdish push for secession.<sup>9</sup> Substantial international acceptance of Kosovo's declaration of independence from Serbia likewise provides fodder for the Kurdish secessionist movement in Iraqi Kurdistan. Despite pronouncements to the contrary by political leaders,<sup>10</sup> Iraqi Kurdistan "is readying itself for anything Baghdad might try once the U.S. pulls out of Iraq—including military assault."<sup>11</sup> Indeed, tensions have already risen between Iraqi Kurdistan and Baghdad since the withdrawal of American troops.<sup>12</sup> With this backdrop, the Kurdish Constitution could represent not only a regional constitution under the federal State of Iraq, but also a means to ultimately achieve independence.<sup>13</sup>

This Article examines the potential of a sovereign state of Kurdistan by analyzing current conceptions of the roles of sovereignty, separatism, and self-

6. See Kelly, *supra* note 1, at 708 (discussing the drafting of an independent Kurdish constitution). See also Sam Dagher, *Times Topics: Kurds*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/subjects/k/kurds/index.html?scp=1&sq=Kurdistan&st=cse> (last updated Oct. 19, 2011) (noting Kurdistan's practice of denying aspirations of secession while pressuring Baghdad for more and more autonomy); Ben Birnbaum, *Iraq's Kurds Satisfied with Autonomy, Premier Says*, WASH. TIMES (Nov. 8, 2011), <http://www.washingtontimes.com/news/2011/nov/8/independent-kurds-can-live-within-iraq-leader-says/?page=1> (highlighting Kurdistan's Premier's public assurances of Kurdish satisfaction with autonomy while noting serious concerns over Iraq's future as a single sovereign state in the wake of American redeployment from Iraq).

7. Kelly, *supra* note 1, at 709.

8. *Id.*

9. See *Iraqi Kurds Inspired by Secession of South Sudan*, HURRIYET DAILY NEWS (July 20, 2011), <http://www.hurriyetdailynews.com/n.php?n=iraqi-kurds-inspired-by-secession-of-south-sudan-2011-07-20> (noting there is a great deal of inspiration from Southern Sudan).

10. Kelly *supra* note 1, at 732 (noting the Iraqi Constitution has provisions in place that protect the local Kurdistan laws).

11. *Id.* at 733.

12. See Tim Arango, *Iraq's Chaos Threatens to Disrupt a Kurdish Haven*, N.Y. TIMES (Jan. 3, 2012), <http://www.nytimes.com/2012/01/04/world/middleeast/anxious-turning-point-for-kurds-in-iraq.html?scp=7&sq=kurdistan&st=cse> (explaining a recent crisis nearly devolving Iraq into civil war, where a politician fled to Iraqi Kurdistan to avoid arrest and has there remained protected and untouchable by the central government); Jon Hemming, *Exxon Moves on Kurdistan Despite Baghdad Threat*, REUTERS (Jan. 25, 2012), <http://www.reuters.com/article/2012/01/25/iraq-kurds-oil-idUSL5E8CP1W320120125> ("Baghdad . . . has long held that all foreign oil deals signed with the Kurdistan Regional Government (KRG) are illegal. But Kurdish officials insist that investment is going ahead and movement on the ground supports their claims.").

13. Kelly, *supra* note 1, at 733 ("They argue that the real agenda of the Kurds is independence, and anyone who reads the Kurdish constitution with a clear eye, would see that it is intended to eventually achieve that aim.").

determination in international law. Specifically, this Article will examine the potential of such a free Kurdish state through a secession of the Northern Iraqi governorates of Dohuk, Erbil, and Sulaymanayah—collectively known as Iraqi Kurdistan<sup>14</sup>—from the Republic of Iraq through the theory of “earned sovereignty” and the use of the aforementioned Kurdish Constitution. Iraqi Kurdistan stands as a reasonable potential candidate for such a secession based upon the theory of earned sovereignty,<sup>15</sup> supported by: (1) the autonomous government under which the region operates;<sup>16</sup> (2) the defined borders of the region’s three governorates;<sup>17</sup> (3) the stable population of over three million people;<sup>18</sup> (4) the capacity to enter into foreign relations with other states;<sup>19</sup> (5) the tenuous state of the sovereignty of the Republic of Iraq; and (6) the historical violations of human rights that Kurds in Iraq have suffered at the hands of Arab regimes in the Iraqi government.<sup>20</sup>

Part II Section A will discuss Iraqi Kurdistan’s historical origins; previous efforts to separate from Iraq; the tumultuous relationship between Kurds and the ruling Arab governments of Iraq; and the ultimate realization of autonomy for the Kurdish Region. Part II Section B will analyze the status of Iraqi Kurdistan’s autonomy under the recently adopted Iraqi Constitution. A brief overview of the traditional understanding of sovereignty in international law<sup>21</sup> and the relatively recently established process of earned sovereignty will be provided in Parts III and IV.<sup>22</sup> Part V will explore the various reasons for which Kurdistan may potentially seek independence through the process of earned sovereignty and discuss Iraqi Kurds’ right to self-determination,<sup>23</sup> how Iraqi Kurdistan meets the internationally accepted criteria for statehood,<sup>24</sup> and the myriad of ways that Iraqi Kurdistan has already taken significant steps toward the achievement of independence or, alternatively, even greater autonomy according to the process of earned sovereignty.<sup>25</sup> Finally, this Article will examine a number of considerations and obstacles that the Kurds must address before achieving independence.<sup>26</sup>

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14. See *The Kurdistan Region in Brief*, KURDISTAN REGIONAL GOVERNMENT, <http://www.krg.org/articles/detail.asp?lngnr=12&smap=03010300&rnr=140&anr=23911>, (last visited Oct. 6, 2011) (noting the Kurdistan region covers Duhok, Erbil, and Suleimaniah).

15. For an analysis of the theory of “earned sovereignty,” see *infra* Part III.

16. *The Kurdistan Region in Brief*, *supra* note 14.

17. *Id.*

18. *Id.*

19. *The Department of Foreign Relations – Kurdistan Regional Government*, KURDISTAN REGIONAL GOVERNMENT (Dec. 7, 2009), <http://krg.org/articles/detail.asp?rnr=267&lngnr=12&smap=04080000&anr=19906>.

20. See Kelly, *supra* note 1, at 716 (noting Kurdistan has suffered different depressions from Turks and Arabs).

21. See *infra* Part III.

22. See *infra* Part IV.

23. See *infra* Part V.A.

24. See *infra* Part V.B.

25. See *infra* Part V.C.

26. See *infra* Part V.D.

## II. BACKGROUND

### A. *Iraqi Kurdistan's Historical Struggle for Autonomy*

The Kurdish people historically are the largest ethnic group in the world without a representative sovereign state.<sup>27</sup> While their traditional homeland lies amongst the Zagros Mountains,<sup>28</sup> today the majority of the estimated thirty-five million Kurds<sup>29</sup> inhabit territory in Armenia, Northern Iraq, Western Iran, Northeastern Syria, and Southeastern Turkey.<sup>30</sup> This regional splitting of the Kurdish population largely stems from the aftermath of World War I, when, in April of 1920, the allies at the Conference of San Remo redrew territorial boundaries of the Middle East.<sup>31</sup> Following incorporation of the San Remo Conference by the Treaty of Lausanne in November of 1922, the San Remo territorial boundaries effectively split the Kurdish population amongst four separate nations, granting 320,000 square kilometers to Turkey; 125,000 square kilometers to Iran; 20,000 square kilometers to Syria; and 174,000 square kilometers to Iraq.<sup>32</sup> Notably, these territorial divisions ignored traditional boundaries of the region and the cultural and ethnic differences between Kurds and Arabs, and failed to recognize the implications of combining traditionally Shiite and Sunni Muslim regions.<sup>33</sup> Prior to the Treaty of Lausanne, the August 1920 Treaty of Sèvres promised the Kurds an independent nation of Kurdistan,<sup>34</sup> but the newly born Republic of Turkey rejected the treaty after the collapse of the Ottoman Empire and Mustafa Kemal Ataturk's successful Turkish War of Independence.<sup>35</sup>

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27. Kelly, *supra* note 1, at 710.

28. KERIM YILDIZ, *THE KURDS IN IRAQ: THE PAST, PRESENT, AND FUTURE* 7 (2007).

29. Sonia Roy, *The Kurdish Issue*, FOREIGN POL'Y J. (Apr. 22, 2011), <http://www.foreignpolicyjournal.com/2011/04/22/the-kurdish-issue/>. See Special Verdict, Case No I/ CSecond/2006, Al Anfal, Iraq High Tribunal, Second Criminal Court, at 37 (June 24, 2007), available at [http://www.haguejusticeportal.net/Docs/NLP/Iraq/Anfal\\_verdict.pdf](http://www.haguejusticeportal.net/Docs/NLP/Iraq/Anfal_verdict.pdf) [hereinafter *Al-Anfal Case*].

30. *Al-Anfal Case*, *supra* note 29, at 37; SUSAN D. MOELLER, *COMPASSION FATIGUE* 38 (1999). See *infra* Figure 1.

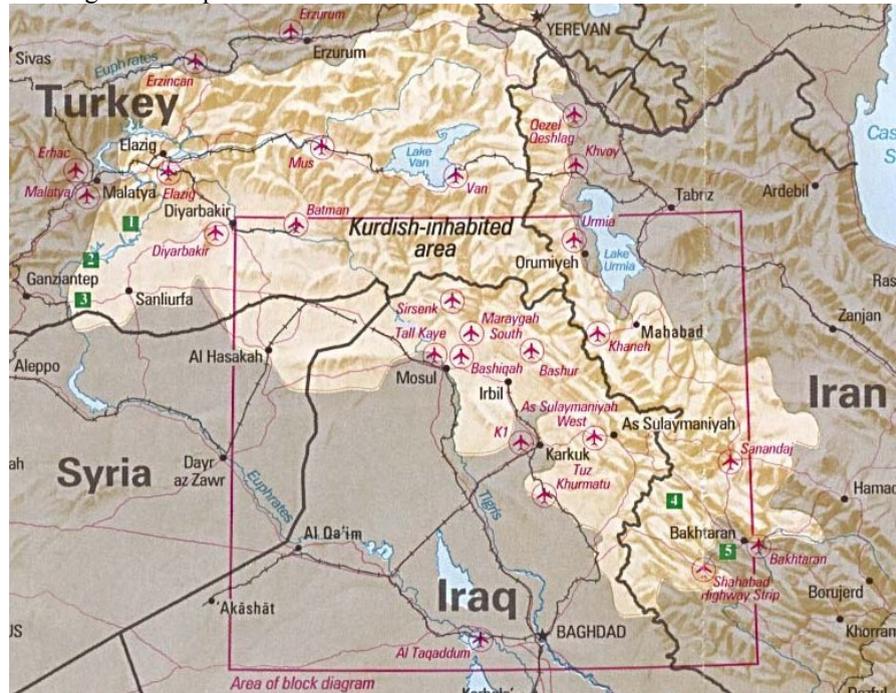
31. COURTNEY HUNT, *THE HISTORY OF IRAQ* 61 (Frank W. Thackeray & John E. Findling, eds., 2005).

32. *Al-Anfal Case*, *supra* note 29, at 37.

33. HUNT, *supra* note 31, at 61.

34. Treaty of Sèvres arts. 62–64, Aug. 10, 1920, 15 AJIL 179. See Natasha Carver, *Is Iraq/Kurdistan a State such that it can be Said to Operate State Systems and thereby Offer Protection to its "Citizens"?*, 14 INT'L J. REFUGEE L. 57, 64 (2002) (discussing the Treaty of Sèvres' contemplation of an independent Kurdish State). See generally YILDIZ, *supra* note 28, at 10–14 (outlining the gradual degeneration of promises for an independent Kurdish state after the Treaty of Sèvres).

35. Kelly, *supra* note 1, at 715; Carver, *supra* note 34, at 64; *Contemporary History, KURDISTAN REGIONAL GOVERNMENT*, <http://krg.org/articles/detail.asp?lngnr=12&smap=03010600&rmr=143&anr=18710> (last updated June 2010); Carole A. O'Leary & Karna A.J. Eklund, *Pluralism vs. Modern Iraqi Nationalism: Root Causes of State Sponsored Violence Against Iraq's Kurdish Community and the Search for Post-Conflict Justice*, 13 MICH. ST. J. INT'L. L. 91, 98 (2005); *Who are the Kurds?*, WASH. POST,

Figure 1: Map of Kurdish Inhabited Area<sup>36</sup>

Since the Treaty of Lausanne dashed Kurdish hopes for an independent Kurdistan, the Iraqi Kurds have achieved considerably more autonomy than their counterparts in Iran, Syria, and Turkey.<sup>37</sup> However, during this journey to autonomy the Kurds in Iraq have suffered continued subjugation at the hands of repressive governments.<sup>38</sup> Before the Treaty of Lausanne, in 1918, 1920, and 1922, Kurdish tribal leaders led unsuccessful revolts against the British Authorities of the post-World War I British Mandate of Mesopotamia in 1919, demanding Kurdish self-rule.<sup>39</sup> British forces helped suppress more revolts in 1930 following Iraq's admission to the League of Nations.<sup>40</sup> From 1961 to 1969, Masoud Barzani led a

<http://www.washingtonpost.com/wp-srv/inatl/daily/feb99/kurdprofile.htm> (last visited Feb. 15, 2012).

36. *Kurdish Lands Map*, GLOBAL SECURITY.ORG, [http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/military/world/war/images/kurdish\\_lands.jpg](http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/military/world/war/images/kurdish_lands.jpg) (last visited Feb. 11, 2012).

37. Kelly, *supra* note 1, at 715.

38. *Id.* at 716; *Al-Anfal Case*, *supra* note 29, at 38–39. See O'Leary & Eklund, *supra* note 35, at 93 (noting Kurds in Iraq were subject to systematic ethnic cleansing dating back to the 1960s). See also *Who are the Kurds?*, *supra* note 35 (“The Kurds have been subjugated by neighboring peoples for most of their history.”); Dagher, *supra* note 6 (“The history of Kurds over the past 90 years has largely been one of struggle and rebellion against governments that have tried to assimilate or at times marginalize them.”).

39. Kelly, *supra* note 1, at 716–17.

40. *Id.* at 717.

successful revolt against the Iraqi government, which led to an agreement providing Kurds with greater autonomy in Iraq.<sup>41</sup> However, in 1974, the Iraqi government, under the military command of Saddam Hussein, renewed offenses against the Kurds and forced Barzani and his followers to flee to Iran.<sup>42</sup>

While the Kurds suffered under the previous Arab Iraqi governments, Saddam Hussein's ascension to the presidency in 1979 precipitated a new era of persecution and human rights violations.<sup>43</sup> Most notably, after many Kurds sided with Iran during the Iran-Iraq War between 1980 and 1988, Saddam's government retaliated by carrying out the "Anfal Campaign," a systematic attempted genocide executed by Ali-Hassan Al-Majid (also known as "Chemical Ali") resulting in the death of approximately 182,000 Kurds in Northern Iraq.<sup>44</sup> During this brutal campaign, Al-Majid destroyed thousands of Kurdish villages, forced a mass exodus, and unleashed chemical weapons on Kurdish civilians.<sup>45</sup>

Shortly after the Anfal Campaign, in 1991, during the aftermath of the first Gulf War, the Kurds launched yet another failed revolt against Saddam.<sup>46</sup> This failed uprising and Saddam's retaliation against the Kurds, however, ultimately led to international re-intervention in Iraq that would create the foundation for the currently autonomous Iraqi Kurdistan.<sup>47</sup> Saddam's brutal response to the Kurdish uprising prompted a U.N.-supported, U.S.-British-French-enforced no-fly-zone, which acted as a safe haven and effectively gave Kurds de facto control over the territory.<sup>48</sup>

While autonomy helped Iraqi Kurdistan progress economically and politically, political disunity stymied efforts at development. In 1992, a parliamentary election resulted in a tie between the two main Kurdish political parties—Jalal Talabani's Patriotic Union of Kurdistan (PUK) and Masoud Barzani's Kurdistan Democratic Party (KDP).<sup>49</sup> While the parties first attempted a power sharing arrangement, negotiations fell through and civil war engulfed the region.<sup>50</sup> The conflict came to an end with the help of American mediation in

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41. *Id.*

42. *Id.* at 718.

43. *See id.* ("Although the Iraqi Kurds had been severely mistreated under successive Arab regimes, this treatment was nothing compared to what they would experience under the iron fist of Saddam Hussein").

44. Bayan Sami Abdul Rahman, *A Milestone for Kurdistan*, THE GUARDIAN (June 25, 2007, 6:30 PM), <http://www.guardian.co.uk/commentisfree/2007/jun/25/amilestoneforkurdistan?INTCMP=SRCH>; Kelly, *supra* note 1, at 718. *See Al-Anfal Case*, *supra* note 29, at 42–55 (discussing in depth the scope and consequences of the Al-Anfal genocide).

45. Kelly, *supra* note 1, at 723, 772. *See Al-Anfal Case*, *supra* note 29, at 42–55 (discussing in depth the scope and consequences of the Al-Anfal genocide).

46. Kelly, *supra* note 1, at 719.

47. *Id.*

48. *Id.*

49. YILDIZ, *supra* note 28, at 44.

50. *Id.* at 48–50.

1998.<sup>51</sup>

After the end of the hostilities between the PUK and KDP, both administrations claimed status as the official government of the Kurdistan region.<sup>52</sup> Even after the adoption of the Iraqi Constitution in 2005,<sup>53</sup> discrepancies remained as to which party, the KDP or the PUK, operated as the rightful government of Kurdistan.<sup>54</sup> However, in 2006, the KDP and the PUK signed the Kurdistan Regional Government Unification Agreement, a power-sharing arrangement creating the position of Prime Minister to rotate between the KDP and the PUK.<sup>55</sup>

Since this agreement, the KRG has operated in a relatively unified manner and has begun to function much like a sovereign state.<sup>56</sup> In comparison to the rest of Iraq, Kurdistan enjoys the highest standard of living, the greatest level of peace, and considerably more foreign investment.<sup>57</sup> The result of years of oppression, uprising, and civil war has led to Kurdistan's current existence as an autonomous state controlling its own foreign policy,<sup>58</sup> borders, security, economy, and natural resources within the Republic of Iraq.<sup>59</sup>

### ***B. Kurdish Autonomy Today Under the Iraqi Constitution***

Iraqi Kurdistan has reaffirmed its status as an autonomous region through the negotiation and adoption by referendum of the "permanent" Iraqi Constitution in 2005.<sup>60</sup> Prior to the adoption of the most recent Iraqi Constitution, Kurds and Shia Iraqis vigorously negotiated the future of the State of Iraq under the guidance of the Coalition Provisional Authority, which governed Iraq in the wake of the U.S. occupation, and drafted a provisional constitution.<sup>61</sup> The provisional constitution, known as the Transitional Administrative Law (TAL), with very little deviation, formed the basis of the current Iraqi Constitution.<sup>62</sup> During the negotiation of the constitution, the Kurds, politically united and powerful,<sup>63</sup> dominated the drafting process.

The Kurds kept everything the TAL gave them, made new gains with respect

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51. *Id.* at 50; Kelly, *supra* note 1, at 719.

52. Philip S. Hadji, *The Case for Kurdish Statehood in Iraq*, 41 CASE W. RES. J. INT'L L. 513, 519 (2009).

53. Kelly, *supra* note 1, at 726.

54. Hadji, *supra* note 52, at 519.

55. *Id.*

56. *Id.*

57. *Id.* at 520. See *Iraqi Kurdistan: Does Independence Beckon?*, THE ECONOMIST (Sept. 6, 2007), <http://www.economist.com/node/9769132> (discussing Kurdistan's great strides in development compared to the rest of Iraq in the wake of the second Gulf War) [hereinafter *Does Independence Beckon?*].

58. Hadji, *supra* note 52, at 520.

59. Kelly, *supra* note 1, at 769.

60. *Id.* at 726.

61. *Id.*

62. *Id.*

63. *Id.*

to a further weakening of the federal government and the ultimate disposition of Kirkuk as well, and even managed to gain a kind of mediating position with respect to some issues such as the question of Islam and the state.<sup>64</sup>

The current Iraqi Constitution, which the Kurds drafted to their advantage, provides the Kurds with considerable power and has even left most Kurdish legislation since 1992 intact.<sup>65</sup> Article 141 of the Iraqi Constitution provides that all legislation enacted in Iraqi Kurdistan since 1992 remain in force and all court decisions and contracts remain valid “unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution.”<sup>66</sup> Under the Constitution, Kurdistan is entitled to its own regional constitution.<sup>67</sup> While Article 13 acts as a supremacy clause ensuring the supremacy of the Iraqi Constitution, the article is drafted in such a way that, to the extent the Constitution is *silent* on a matter, “regional constitution . . . may control a given issue or area of authority.”<sup>68</sup>

Notably, Article 110 of the Constitution only grants the federal government exclusive authority in nine distinct areas:

First:Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.

Second:Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq’s borders and to defend Iraq.

Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank.

Fourth:Regulating standards, weights, and measures.

Fifth:Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum.

Sixth:Regulating the policies of broadcast frequencies and mail.

Seventh:Drawing up the general and investment budget bill.

Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions.

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64. ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 232 (2009).

65. Kelly, *supra* note 1, at 732; Article 141, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

66. Article 141, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

67. Kelly, *supra* note 1, at 726; Article 117, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

68. Kelly, *supra* note 1, at 727.

Ninth: General Population statistics and census.<sup>69</sup>

Articles 112 through 114 note other particular areas where regional governments and the central government must share power, including oil and gas development,<sup>70</sup> antiquities, customs enforcement, water resources, education, environmental policy, electric energy distribution, and health policy.<sup>71</sup> Further, similar to the U.S. Constitution's Tenth Amendment, Article 115 of the Iraqi Constitution provides that "[a]ll powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates that are not organized in a region."<sup>72</sup> The provision also notes that the laws of regional governments prevail over the law of the central government with regard to shared powers enumerated in Articles 112 through 114.<sup>73</sup>

The current status of Iraqi Kurdistan as a highly autonomous region with a long history of armed conflict with Arab oppressors; a central government with limited power; a pending referendum on a Kurdish Regional Constitution; and the recent exit of U.S. troops from Iraq pose significant questions for the future relationship between Iraqi Kurdistan and the Federal Republic of Iraq.<sup>74</sup> The Iraqi Kurds' history of frustrated efforts to exercise self-determination coupled with the current political circumstances in Iraq leads to the consideration of the potential for a future independent Iraqi Kurdistan.

In particular, the region could use the principle of earned sovereignty, a process for achieving either independence or considerable autonomy recently used by East Timor, Northern Ireland, Montenegro, Kosovo, Bougainville, and South Sudan.<sup>75</sup> The circumstances in Iraqi Kurdistan closely resemble some of those in

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69. Article 110, *Doustour Jomhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005.

70. The sharing of oil resources has remained a source of serious tension between Baghdad and Kurdistan. See H.G., *Iraq's Oil and Gas Riches: Signing Away the Clouds*, THE ECONOMIST (Nov. 30, 2011), <http://www.economist.com/blogs/schumpeter/2011/11/iraqs-oil-and-gas-riches> (discussing the long-standing dispute between Kurdistan and Baghdad over control of oil resources and noting recent deals struck exclusively between Kurdistan and Exxon Mobil without any involvement with the central government); *Iraq Without America: Sovereignty Without Security*, THE ECONOMIST (Dec. 31, 2011), <http://www.economist.com/node/21542200> ("[F]oreign firms are taking risks if they make oil deals in the Kurdish north, since the government in Baghdad and the Kurds' regional authorities have failed to agree on how to divide the spoils, despite years of acrimonious negotiation. After ExxonMobil decided, in frustration, to sign a deal with the Kurds in October, the central government responded furiously, threatening to penalise any company that dealt with the Kurds without its agreement.").

71. Articles 112–114, *Doustour Jomhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005.

72. *Id.* art. 115.

73. *Id.*

74. See Kelly, *supra* note 1, at 732 ("Indeed, the recent feuding between the president of the Kurdish regional government, Massoud Barzani, and the prime minister in Iraq, Nouri al-Maliki, forebodes a potentially rock turn of events once U.S. forces withdraw from Iraq in 2010.").

75. See Paul R. Williams & Francesca Janotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self Determination*, 40 STAN. J. INT'L L. 347, 356–60 (2004) (discussing those nations where the earned sovereignty approach is being attempted).

countries that have successfully used the process of earned sovereignty to achieve independence. In the alternative, if Iraqi Kurdistan cannot achieve full independence, then the principle of earned sovereignty may also simply provide more autonomous rights to the Kurds in Iraq.<sup>76</sup>

### III. THE FUNDAMENTAL PRINCIPLES OF SOVEREIGNTY

Analysis of the potential for an independent Kurdistan through earned sovereignty requires an understanding of the basic principles of sovereignty. The concept of sovereignty has long permeated significant issues of international law. While the definition of sovereignty is not well defined under international law, states consider sovereignty as a pathway to participate in the international community.<sup>77</sup> The traditional concept of sovereignty provides that sovereignty is absolute, meaning that a state is either sovereign, or it is not.<sup>78</sup> With sovereignty come a number of advantages, the most often cited being: juridical and political independence,<sup>79</sup> territorial integrity,<sup>80</sup> and non-intervention.<sup>81</sup>

Juridical and political independence most accurately comprises of absolute power over all legal authority within the state.<sup>82</sup> With juridical and political independence, a sovereign state may exclusively enter into agreements with other nations; become a member of international organizations;<sup>83</sup> regulate its own

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76. See *id.* at 354–55 (“In some instances, the substate entity may acquire sovereign authority and functions sufficient to enable it to seek international recognition, while in others the substate entity may only acquire authority to operate within a stable system of heightened autonomy.”).

77. See Paul R. Williams & Karen Heymann, *Earned Sovereignty: An Emerging Conflict Resolution Approach*, 10 ILSA J. INT'L COMP. L. 437, 442 ([S]overeignty is concerned with establishing the status of a state entity in the international system as well as determining its internal governing rights.”). See MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 12 (1995) (describing state perception of sovereignty as a “ticket of general admission to the international arena”). See also James Gow, *Shared Sovereignty, Enhanced Security: Lessons from the Yugoslav War*, in STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 154 (Sohail H. Hashmi ed., 1997) (“States are the necessary components of an international system, and the principle by which they are ordered is that of sovereignty”).

78. Williams & Heymann, *supra* note 77, at 442; David A. Lake, *The New Sovereignty in International Relations*, 5 INT'L STUD. REV. 303, 306 (2003).

79. Williams & Heymann, *supra* note 77, at 442; IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 115 (3d rev. ed. 1999); PAUL SEIGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 11 (1983).

80. Williams & Heymann, *supra* note 77, at 442; Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 27 (1999); T.J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 52 (7th ed. 1928).

81. Williams & Heymann, *supra* note 77 at 442; SEIGHART, *supra* note 79, at 15; SEIDL-HOHENVELDERN, *supra* note 79, at 100; Daniel Philpott, *Ideas and the Evolution of Sovereignty*, in STATE SOVEREIGNTY: CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 19 (Sohail H. Hashmi ed., 1997).

82. SEIDL-HOHENVELDERN, *supra* note 79, at 115.

83. Williams & Heymann, *supra* note 77, at 442.

nationals; and declare war.<sup>84</sup> Under the principle of juridical and political independence, a sovereign state has more than simply autonomy, and no other state may assert legal authority over another state claiming to be sovereign.<sup>85</sup>

Territorial integrity emphasizes the importance of control over territory.<sup>86</sup> According to this principle, a state's fixed boundaries contain that state's territorial possession, and thus those boundaries are inviolable.<sup>87</sup> Related to both juridical and political independence and territorial integrity, the principle of non-intervention prescribes that the international community must not intervene in the domestic affairs of any other sovereign state.<sup>88</sup> Accordingly, all matters that fall within a sovereign state's scope of domestic affairs remain protected from any outside interference by other states.<sup>89</sup>

However, a number of other international legal mechanisms limit the principle of non-intervention: consent to intervention by the respective sovereign state;<sup>90</sup> activities of U.N. agencies and programs providing emergency aid; intervention by the international community as sanctioned by the U.N. Security Council through Chapter VII of the U.N. Charter; and, occasionally, unilateral intervention by foreign states and groups of states.<sup>91</sup>

#### IV. MODERN SOVEREIGNTY CONFLICTS AND THE PRINCIPLE OF EARNED SOVEREIGNTY

While juridical and political independence, territorial integrity, and non-intervention continue to represent the definitive law on sovereignty, these principles do not necessarily obviate the possibility of legal secession of territories from sovereign states. The continued existence and recent resolution of multiple sovereignty-based conflicts resulting in the creation of internationally recognized new independent states confirms such a possibility.<sup>92</sup> One available option for the

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84. SEIGHART, *supra* note 79, at 11.

85. SEIDL-HOHENVELDERN, *supra* note 79, at 20; FOWLER & BUNCK, *supra* note 77, at 37.

86. Anghie, *supra* note 80, at 27.

87. *See id.* ("International Law regards states as political units possessed of proprietary rights over definite portions of the earth's surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organized and civilized, to come under its provisions."); LAWRENCE, *supra* note 80, at 52 ("The rules of modern International Law are so permeated from end to end with the idea of territorial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth's surface which in its collective capacity it owned.").

88. SEIDL-HOHENVELDERN, *supra* note 79, at 100. *See* Philpott, *supra* note 81, at 20 ("Supreme authority within a territory means not only sovereignty within borders, but also implies immunity from external interference").

89. SEIGHART, *supra* note 79, at 11.

90. Robert H. Jackson & Carl G. Rosberg, *Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood*, 35 WORLD POL. 1, 20 (1982).

91. CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE 153, 187 (2010).

92. *See generally* Williams & Pecci, *supra* note 75 (examining the process of earned sovereignty in recent creation of new states); Hadji, *supra* note 52 (discussing the efficacy of

resolution of sovereignty based claims lies in the process of earned sovereignty.<sup>93</sup>

The process of earned sovereignty aims at the creation of a new sovereign state under international supervision through a process of conditional and gradual transference of sovereign power from a state to a sub-state entity.<sup>94</sup> Achievement of independence through earned sovereignty encompasses six steps—three mandatory and three optional.<sup>95</sup> Mandatory elements include: (1) shared sovereignty, (2) institution building, and (3) final status.<sup>96</sup> Optional steps include: (1) conditional sovereignty, (2) phased sovereignty, and (3) constrained sovereignty.<sup>97</sup>

### ***A. Shared Sovereignty***

The first mandatory element contemplates the sharing of sovereign authority over a defined territory between the state and the sub-state entity.<sup>98</sup> This mandatory element seeks to “disperse the often violent tension associated with sovereignty-based conflicts and to ease the parties onto a path for the long-term resolution of the conflict.”<sup>99</sup> In short, the shared sovereignty element of earned sovereignty acts like a “cooling-off” period between the state and the sub-state entity.<sup>100</sup> International participation often oversees and aids in the implementation of shared sovereignty.<sup>101</sup> In most cases, sub-state entities engaging in shared sovereignty seek independence from their associated state.<sup>102</sup>

### ***B. Institution Building***

During this period of shared sovereignty, the sub-state entity, with the cooperation and assistance of the international community, begins the process of

earned sovereignty in the creation of multiple new states and urging its use in Kurdistan).

93. Williams & Pecci, *supra* note 75, at 349–50; Williams & Heymann, *supra* note 77, at 437.

94. Williams & Pecci, *supra* note 75, at 350; Hadji, *supra* note 52, at 528. See Williams & Heymann, *supra* note 77, at 437 (“[T]he international community is utilizing an evolving process where sovereignty exists as a spectrum with a range of varying sovereign statuses as part of that continuum.”).

95. James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 DENV. J. INT’L. & POL’Y 355, 356 (2003).

96. *Id.* at 356; Williams & Heymann, *supra* note 77, at 437–38; Williams & Pecci, *supra* note 75, at 355–56; Hadji, *supra* note 52, at 529.

97. Hooper & Williams, *supra* note 95, at 356; Williams & Heymann, *supra* note 77, at 438; Williams & Pecci, *supra* note 75, at 356.

98. Hooper & Williams, *supra* note 95, at 357, 361; Williams & Pecci, *supra* note 75, at 355.

99. Hooper & Williams, *supra* note 95, at 361.

100. *Id.*

101. See *id.* at 361 (stating that “[i]n some instances, international institutions may . . . exercise sovereign authority and functions in addition to or in lieu of the parent state” and that “[i]n rare instances, the international community may exercise shared sovereignty with an internationally recognized state.”).

102. *Id.* at 362 (“In most instances shared sovereignty occurs between states and sub-state entities seeking autonomy or independence.”).

creating new institutions—or the modification of existing ones—for self-government.<sup>103</sup> While the process of institution building often begins during the period of shared sovereignty, “in some instances the sub-state entity may begin to create institutions of self-government prior to the period of agreed shared sovereignty.”<sup>104</sup> The creation of such institutions aids the gradual development of the sub-state entity’s capacity to effectively assume total sovereign authority over a particular territory.<sup>105</sup>

### ***C. Determining Final Status***

After a period of shared sovereignty and the creation of new or modified institutions of self-governance, the sub-state entity must eventually achieve a final status.<sup>106</sup> The final status of the sub-state entity may range from substantial autonomy within the associated state to full independence.<sup>107</sup> The process to determine final status often takes the form of a referendum, but may also involve a negotiated settlement between the state and sub-state entity, often with international community participation.<sup>108</sup> Regardless of the result of the final status determination, however, “the determination of final status for the sub-state entity is conditioned on the consent of the international community in the form of international recognition.”<sup>109</sup>

### ***D. The Optional Elements of Earned Sovereignty***

The first optional element of earned sovereignty—phased sovereignty—involves “the measured devolution of sovereign functions and authority from the parent state or international community to the sub-state entity during the period of shared sovereignty.”<sup>110</sup> In other words, to enhance the relationship between the mandatory elements of shared sovereignty and institution building, the sub-state entity will accumulate gradually sovereign authority from the relevant state over a period of time before determination of final status.<sup>111</sup>

The second optional element—conditional sovereignty—“may be applied to the accumulation of increased sovereign authority by the sub-state entity, or it may

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103. Williams & Pecci, *supra* note 75, at 355. *See also* Hooper & Williams, *supra* note 95, at 364–65 (stating that it is essential that during shared sovereignty institutions be constructed to help facilitate self-government).

104. Hooper & Williams, *supra* note 95, at 366.

105. *See* Williams & Pecci, *supra* note 75, at 363 (stating that “institution building is intended to create the capacity for the assumption of sovereign authority and the functions necessary for the establishment of an autonomous entity . . .”).

106. *Id.* at 365.

107. *Id.*

108. *Id.* at 355.

109. *Id.* at 355–56.

110. *Id.* at 366.

111. *See* Williams & Pecci, *supra* note 75, at 356 (stating that the “accumulation of sovereign authority and functions may be correlated with the ability of the [sub-state] entity to assume these powers, as a reward for responsible state behavior, or a combination of both.”).

be applied as a set of standards to be achieved prior to the determination of the sub-state entity's final status."<sup>112</sup> Conditional sovereignty essentially acts as a set of benchmarks that a sub-state entity must meet before determination of final status.<sup>113</sup>

The final optional element—constrained sovereignty—operates as a set of limitations on the sovereign powers of the sub-state entity.<sup>114</sup> Continued international administrative or military presence in the sub-state entity represents such a limitation under constrained sovereignty.<sup>115</sup>

## V. KURDISTAN MAY SECEDE FROM THE FEDERAL REPUBLIC OF IRAQ THROUGH EARNED SOVEREIGNTY

### A. *The Iraqi Kurds Have a Valid Claim to Independence Based on the Right to Self-Determination*

Self-determination is “the right of peoples freely to determine their political status and to pursue their economic, social and cultural development . . . .”<sup>116</sup> While vaguely defined, the right of peoples to self-determination has become an accepted legal principle in international law.<sup>117</sup> Article 1 of the U.N. Charter specifically includes the right of self-determination, stating that one of the organization's fundamental purposes is “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .”<sup>118</sup> Moreover, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights reiterate the duty of states to promote the right of self-determination.<sup>119</sup>

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States provides that “[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of *peoples*, in accordance with the provisions of the Charter . . . .”<sup>120</sup> The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 reaffirms the right of all peoples to self-

112. *Id.*

113. *Id.* (stating that these “benchmarks vary depending on the characteristics of the conflicts . . .”).

114. *Id.*

115. *Id.*

116. YILDIZ, *supra* note 28, at 191.

117. *Id.*

118. U.N. Charter art. 1, para. 2. *See also* U.N. Charter art. 55 (calling on states to respect human rights, including the right of self-determination of peoples).

119. YILDIZ, *supra* note 28, at 192. *See also* International Covenant on Civil and Political Rights art. 1, Mar. 23, 1976, 999 U.N.T.S. 171 (“All peoples have the right of self-determination.”); International Covenant on Economic, Social and Cultural Rights art. 1, Jan. 3, 1976, 993 U.N.T.S. 3 (“All peoples have the right of self-determination.”).

120. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No 10, U.N. Doc. A/RES/2625, at 123–24 (Oct. 24, 1970) (emphasis added).

determination.<sup>121</sup> Notably, international law has yet to agree upon the definition of “peoples” as outlined in various international conventions.<sup>122</sup>

Historically, the right to self-determination of peoples explicitly applied only to “trust territories” and “non-self-governing territories” in the context of ending colonialism.<sup>123</sup> The U.N. General Assembly established a Special Committee in 1959 to provide criteria for trust territories and non-self-governing territories.<sup>124</sup> The following year, in 1960, the UNGA adopted Resolution 1514(XV), which established a set of restrictive criteria for determining which territories should be included in the definition of trust territories and non-self-governing territories.<sup>125</sup> The General Assembly’s basic requirements were that a territory be “geographically separate” and “ethnically distinct” from the country administering that territory.<sup>126</sup>

State practice has indicated, however, that the right to self-determination, while often invoked under such circumstances, applies to more cases than the limited situations of decolonization or to so called trust and non-self-governing territories.<sup>127</sup> After a unilateral declaration of independence in 2009, the widespread international recognition of Kosovo—officially neither a trust territory nor a non-self-governing territory according to the U.N. General Assembly—demonstrates the lack of a decolonization requirement.<sup>128</sup> While groups of individuals sharing common traits such as ethnicity, language, religion, geographic location, and cultural bond may be relevant to the legitimacy of a self-determination claim, state practice and international law have refused to concede that all minority or indigenous groups have a right to exercise self-determination.<sup>129</sup>

Despite the lack of an established set of official criteria for a right of self-determination of peoples, the Iraqi Kurds likely qualify to exercise the right of self-determination. First, the Iraqi Kurds satisfy the U.N. General Assembly’s traditional requirements of geographical separateness and ethnic distinction.<sup>130</sup>

121. *See generally* Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514(XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/RES/1514 (Dec. 14, 1960).

122. YILDIZ, *supra* note 28, at 193.

123. *Id.* at 192 (referring to the terms “trust territories” and “non-self governing territories” as terms of art developed by the United Nations).

124. *Id.* *See generally* U.N. Charter ch. XII (establishing the trusteeship system “for the administration and supervision of such territories as may be 2 there under by subsequent individual agreements”).

125. YILDIZ, *supra* note 28, at 192.

126. *Id.* at 193.

127. *Id.*

128. *See generally* Kosovo, U.S. DEPARTMENT OF STATE, <http://www.state.gov/outofdate/bgn/kosovo/157820.htm>, (last visited Mar. 4, 2013) (providing a synopsis of Kosovo’s process towards independence).

129. YILDIZ, *supra* note 28, at 193.

130. *Id.* at 192–93 (stating that the “principal characteristic[s]” to determine whether a

Iraqi Kurdistan remains geographically separate from the rest of Iraq, as acknowledged in the Iraqi Constitution.<sup>131</sup> Next, the Kurds are a distinct ethnicity, having their own language, customs, and a rich history spanning thousands of years.<sup>132</sup> The Kurds are said to be descendents of the biblical Medes; have strikingly different physical features from other people living in the region; and have maintained a longstanding tradition of a distinct nomadic culture.<sup>133</sup>

In addition to satisfying the traditional requirements for a right to self-determination, history indicates the international community's prior acknowledgment of a Kurdish right to self-determination, evidenced by the Treaty of Sèvres' planned establishment of an independent Kurdish State.<sup>134</sup> Further, the international community should recognize the Kurdish claim to independence because the circumstances in Iraqi Kurdistan closely mirror those leading up to the exercise of self-determination by the Kosovars in 2008. In Kosovo, NATO forces engaged in a bombing campaign against Serb military forces to prevent genocide of the ethnic Albanian Kosovars in Southern Serbia.<sup>135</sup> At the end of the NATO campaign on June 9, 1999, NATO and the Federal Republic of Yugoslavia signed an agreement to withdraw Yugoslav troops from Kosovo.<sup>136</sup> After the withdrawal of Yugoslav troops, the United Nations established the Interim Administration in Kosovo (UNMIK), which provided protection to the Kosovars and gave the region substantial autonomy within Yugoslavia.<sup>137</sup> The United Nations oversaw the autonomous region of Kosovo for eight years,<sup>138</sup> until finally, in 2008, the

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territory was non-self governing was if the territory was "geographically separate" and "ethnically distinct").

131. Articles 4, 117, 141 Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

132. See JOHN BULLOCH & HARVEY MORRIS, NO FRIENDS BUT THE MOUNTAINS 51, 55–57 (1992) (providing a brief synopsis of the Kurds and their history).

133. Gregory J. Ewald, *The Kurds' Right to Secede Under International Law: Self-Determination Prevails Over Political Manipulation*, 22 DENV. J. INT'L L. POL'Y 375, 394–95 (1994).

134. See Treaty of Sèvres, *supra* note 34, art. 64 (reaffirming the planned establishment of an independent Kurdish State in the aftermath of World War I); BULLOCH & MORRIS, *supra* note 132, at 90 (discussing the aftermath of the breakdown of the Ottoman Empire and the Treaty of Sèvres' plan for an independent Kurdish State).

135. See Francis X. Clines, *Crisis in the Balkans: The Overview; NATO Hunting for Serb Forces; U.S. Reports Signs of "Genocide"*, N.Y. TIMES (Mar. 30, 1999), <http://www.nytimes.com/1999/03/30/world/crisis-balkans-overview-nato-hunting-for-serb-forces-us-reports-signs-genocide.html?pagewanted=all&src=pm> (reporting that NATO and the U.S. "stepped-up" its bombing campaign to halt Serbia's attack of Kosovo).

136. Beth DiFelice, *International Transitional Administration: The United Nations in East Timor, Bosnia-Herzegovina, Eastern Slavonia, and Kosovo – A Bibliography*, 35 INT'L J. LEGAL INFO 63, 66 (2007).

137. See S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999) (establishing "an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy . . .").

138. *Kosovo*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/serbia/kosovo/index.html?scp=1-spot&sq=Kosovo&st=cse> (last updated Nov. 29, 2012).

Kosovars unilaterally declared independence from Serbia.<sup>139</sup>

Like Kosovo, Kurdistan has a history of asserting the right to self-determination without success;<sup>140</sup> the Kurds have suffered genocidal acts under repressive regimes;<sup>141</sup> and, for years, the Kurds have operated with substantial autonomy.<sup>142</sup> Based upon these striking similarities, the Iraqi Kurds should have an equal right to self-determination like the Kosovars in Serbia.

### ***B. Kurdistan Satisfies the Criteria for Statehood Under the Montevideo Convention***

Logically, before seceding from the State of Iraq and achieving recognition as an independent state, Kurdistan must satisfy the criteria required for statehood. Kurdistan has already satisfied the criteria for statehood according to the Montevideo Convention on the Rights and Duties of States (Montevideo Convention).<sup>143</sup> The Montevideo Convention, while only technically a regional treaty signed by twenty states,<sup>144</sup> stands as a generally accepted reflection of the requirements of statehood under international law.<sup>145</sup> The Montevideo Convention requires states to demonstrate: “(1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with the other states.”<sup>146</sup> Kurdistan clearly satisfies all of these requirements.

First, Kurdistan has a permanent population of approximately four million people in Iraq.<sup>147</sup> This population certainly meets the Montevideo Convention

139. *See Independence Day: Kosovo Declares its Secession from Serbia*, THE ECONOMIST (Feb. 17, 2008), <http://www.economist.com/node/10711623> (reporting that Kosovo declared its independence on February 17, 2008).

140. *See id.* (noting more than one failed attempt in the past by Kosovo to declare independence).

141. *See Al-Anfal Case*, *supra* note 29 (detailing genocidal acts against the Kurds in Iraqi Kurdistan); Williams & Pecci, *supra* note 75, at 372 (noting historical Serbian mistreatment of Kosovars).

142. *See Kosovo*, *supra* note 138 (detailing the timeline of U.N. administration and Kosovar autonomy); *Does Independence Beckon?*, *supra* note 57 (noting Iraqi Kurdistan’s longstanding autonomy).

143. *See* Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19, at art. 1 (“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.”) [hereinafter Montevideo Convention].

144. *See generally id.*

145. *See* Thomas D. Grant, *Statehood: The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT’L L. 403, 414 (1999) (noting that the Montevideo Convention statehood requirements have held a “prominent role in efforts to define statehood”). *See also* Alexander H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 U. PA J. INT’L L. 531, 548 (2009–2010) (“Like sailors to a siren’s song, no writer seems able to resist beginning by citing the requirements for statehood laid out in the 1933 Montevideo Convention on the Rights and Duties of States.”).

146. Montevideo Convention, *supra* note 143, art. 1.

147. MICHAEL M. GUNTER, THE KURDS ASCENDING: THE EVOLVING SOLUTION TO THE KURDISH PROBLEM IN IRAQ AND TURKEY 2 (2008); MEHRDAD R. IZADY, THE KURDS: A

criteria of a permanent population, as many others are considered states “despite minimal populations.”<sup>148</sup> Indeed, the United Nations consistently recognizes states with populations far lower than the four million found in Iraqi Kurdistan.<sup>149</sup>

Next, Kurdistan also likely satisfies the requirement that the state has a defined territory. Kurdistan has existed as an autonomous region in Iraq for over a decade, and even the Iraqi Constitution recognizes Kurdistan as a federal state.<sup>150</sup> Territorial questions remain, however. For example, a dispute over whether or not Kirkuk, the historical capital of Kurdistan,<sup>151</sup> belongs to the autonomous region of Kurdistan has lingered unresolved.<sup>152</sup> Likewise, the KRG and the central government in Baghdad continue to disagree on the territorial location of other disputed areas with large Kurdish contingents, such as Sinjar, Makhmur, and Mosul.<sup>153</sup>

While these territorial disputes remain, they would likely not hinder Kurdistan’s achievement of the requirement of a defined territory. State practice indicates that the Montevideo Convention’s requirement of a defined territory is unrestrictive.<sup>154</sup> For example:

Albania and Yemen were acknowledged as states “without fully delimited or defined boundaries.” The Congo was acknowledged as a state even though a significant part, Katanga, “was actively engaged in a secessionist attempt”; and Israel, Kuwait, and Mauritania have been accepted as states in the face of claims by other states to the entirety of their territory.<sup>155</sup>

Kurdistan also satisfies the Montevideo Convention’s requirement that the

CONCISE HANDBOOK: THE KURDS 120 (1992).

148. See Berlin, *supra* note 145, at 550 (explaining that the permanent population requirement is flexible because a number of states like San Marino and Tuvalu are considered states even with a minimum population).

149. See, e.g., U.N. Statistics Div., Environment Statistics Country Snapshot: Iceland, (Aug. 2011),

[http://unstats.un.org/unsd/environment/envpdf/Country\\_Snapshots\\_Aug%202011/Iceland.pdf](http://unstats.un.org/unsd/environment/envpdf/Country_Snapshots_Aug%202011/Iceland.pdf) (stating that Iceland’s population was 320,000 in 2010); U.N. Statistics Div., Environment Statistics Country Snapshot: Andorra, (Aug. 2011), [http://unstats.un.org/unsd/environment/envpdf/Country\\_Snapshots\\_Aug%202011/Andorra.pdf](http://unstats.un.org/unsd/environment/envpdf/Country_Snapshots_Aug%202011/Andorra.pdf) (stating that in 2010 the state’s population was at 85,000); U.N. Statistics Div., Environment Statistics Country Snapshot: Tuvalu, (Aug. 2011), [http://unstats.un.org/unsd/environment/envpdf/Country\\_Snapshots\\_Aug%202011/Tuvalu.pdf](http://unstats.un.org/unsd/environment/envpdf/Country_Snapshots_Aug%202011/Tuvalu.pdf) (stating that the population of Tuvalu in 2010 was 10,000).

150. Articles 4, 113, 137, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

151. Kelly, *supra* note 1, at 744.

152. GUNTER, *supra* note 147, at 40.

153. *Id.*

154. Berlin, *supra* note 145, at 550.

155. *Id.* (citing SCOTT PEGG, INTERNATIONAL SOCIETY AND THE DE FACTO STATE 46–47 (1998)). See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. b (1987) (“An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.”).

state have a government. Like the other requirements of the Montevideo Convention, the government requirement also appears relaxed, as states with almost entirely ineffective governments still received recognition of statehood.<sup>156</sup> The KRG has both a legislative branch in the form of a parliament and an executive branch in the form of the Council of Ministers.<sup>157</sup> The KRG has existed in the autonomous Kurdistan region as a de facto independent state since 1991,<sup>158</sup> and today the Iraqi Constitution provides the KRG with substantial control.<sup>159</sup> In particular, Article 141 of the Iraqi Constitution reads:

Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution.<sup>160</sup>

Also noteworthy, the central Iraqi government does not even have exclusive authority over certain valuable resource rights, such as oil.<sup>161</sup> The Iraqi Constitution provides for federal supremacy over nine particular areas of the law.<sup>162</sup> Oil, however, falls under the shared responsibility of both regional and central governments.<sup>163</sup> Additionally, the only security forces in Kurdistan are *peshmerga* forces, loyal to the KRG, while Iraqi troops have not entered Kurdish

156. See Berlin, *supra* note 145, at 550 (“The Congo was acknowledged as a state in the midst of a civil war and with ‘governing structures that were completely ineffective for a number of years;’ the U.N. considered Rwanda and Burundi to be states ‘even though the General Assembly openly acknowledged that they did not fulfill the traditional criterion of effective government;’ Angola was similarly considered a state, despite undergoing a civil war ‘with three competing would-be governments all proclaiming their rule.’”).

157. YILDIZ, *supra* note 28, at 124.

158. Peter W. Galbraith, *Kurdistan in a Federal Iraq*, in *THE FUTURE OF KURDISTAN IN IRAQ* 268 (O’Leary et al. eds., 2005); Kelly, *supra* note 1, at 719.

159. Articles 4, 113, 137, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005. See Carver, *supra* note 34, at 73 (“Executive, legislative and judicial functions are practiced within the region in principle, by the Kurdistan Regional Government (KRG), the Kurdistan National Assembly, and the court institutions.”).

160. Article 141, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

161. See Kelly, *supra* note 1, at 754 (explaining that the Iraqi Constitution has authority over a number of areas but oil is not one of them). See also Article 112, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (“The federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.”); H.G., *Iraq’s Oil and Gas Riches: Signing Away the Clouds*, *THE ECONOMIST* (Nov. 30, 2011), <http://www.economist.com/blogs/schumpeter/2011/11/iraqs-oil-and-gas-riches> (noting the contentious relationship between the KRG and Baghdad regarding recent oil deals struck in Kurdistan with Exxon-Mobil without central government approval).

162. Kelly, *supra* note 1, at 728.

163. Articles 112–114, Doustour Jomhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

territory since 1996.<sup>164</sup> With that support, the KRG is clearly a government, satisfying the third requirement of the Montevideo Convention.

Finally, Kurdistan satisfies the requirement of a capacity to enter into relations with states by virtue of the KRG's continued engagement with the international community.<sup>165</sup> The KRG, with its own Department of Foreign Affairs,<sup>166</sup> has begun engaging with foreign governments through the creation of consulates within the Kurdistan region.<sup>167</sup> States such as France, Germany, Iran, Russia, and Turkey have opened consulates in the Kurdish capital of Erbil.<sup>168</sup> The KRG has expanded its own diplomatic engagements overseas, including initiation of lucrative investment projects.<sup>169</sup> Furthermore, the KRG has met with the U.S. Secretary of State and the U.K. Foreign Secretary.<sup>170</sup> Thus, Kurdistan's KRG clearly demonstrates a capacity to enter into relations with other states.

By satisfying the Montevideo Convention criteria of: (1) a permanent population, (2) a defined territory, (3) a government, and (4) a capacity to enter into relations with states, Kurdistan satisfies the requirements for statehood under customary international law.<sup>171</sup>

### ***C. Kurdistan has Already Made Significant Steps in the Process of Achieving Independence Through Earned Sovereignty***

For decades, Iraqi Kurdistan has been unofficially engaged in the process of completing mandatory elements of earned sovereignty.<sup>172</sup>

#### **1. Kurdistan has already begun engaging in shared sovereignty**

While autonomy and sovereignty are admittedly not one and the same, shared

164. Peter W. Galbraith, *Iraq: The Way to Go*, N.Y. REV. BOOKS (Aug. 16, 2007), <http://www.nybooks.com/articles/archives/2007/aug/16/iraq-the-way-to-go/?pagination=false>. See Carver, *supra* note 34, at 68 (noting the *peshmerga* forces' status as a sort of Kurdish militia responsible for upholding law and order within Iraqi Kurdistan).

165. See *Official Order No. 143*, KURDISTAN REGIONAL GOVERNMENT- IRAQ, [http://www.krg.org/uploads/documents/Official\\_order\\_25\\_Jan\\_09\\_2009\\_06\\_04\\_h19m0s19.pdf](http://www.krg.org/uploads/documents/Official_order_25_Jan_09_2009_06_04_h19m0s19.pdf) (discussing the Kurdistan government's mission to strengthen the state's position with foreign countries).

166. *Id.*

167. DENISE NATALI, *THE KURDISH QUASI-STATE* xxvi (Mehrzad Boroujerdi ed., 2010).

168. *The Department of Foreign Relations*, KURDISTAN REGIONAL GOVERNMENT (Dec. 7, 2009), <http://www.krg.org/articles/detail.asp?nr=267&lngn=12&smap=04080000&anr=19906>.

169. See NATALI, *supra* note 167 (stating that the KRG has supported investment projects like the exportation of petroleum in the Kurdistan region).

170. Press Release, KURDISTAN REGIONAL GOVERNMENT, U.K. Foreign Secretary and President Barzani Discuss Closer Ties (Dec. 18, 2007), *available at* <http://www.krg.org/articles/detail.asp?lngn=12&smap=02010100&nr=223&anr=22021>; Press Release, U.S. Dep't of State, Remarks with Massoud Barzani, President of the Kurdish Regional Government After Their Meeting (Oct. 6, 2006), *available at*, <http://www.state.gov/secretary/rm/2006/73702.htm>.

171. Grant, *supra* note 145.

172. See *supra* Part IV (discussing Kurdistan's progression through the stages of earned sovereignty).

sovereignty—the first step toward earned sovereignty—often begins with the provision of substantial autonomy to the sub-state entity.<sup>173</sup> The process of earned sovereignty for the Autonomous Region of Bougainville (“Bougainville”) from Papua New Guinea aptly demonstrates this concept.<sup>174</sup> Through the Comprehensive Agreement for Bougainville (“Bougainville Agreement”) signed in August of 2001, Bougainville received an autonomous interim arrangement providing for shared authority between the governments of Papua New Guinea and Bougainville.<sup>175</sup> The Bougainville Agreement allows for Bougainville to control a wide range of autonomous powers while sharing others with the government of Papua New Guinea.<sup>176</sup> The Constitution of Papua New Guinea guarantees the continued existence of this power sharing arrangement, as Parliament may not amend the constitution without the consent of Bougainville.

Since 1970, Kurdistan has successfully negotiated with the Iraqi government for substantial autonomy multiple times, as evidenced by the March Manifesto, a legislative agreement between Iraqi Kurdistan and Iraq granting autonomy to the Kurdish region, including provisions requiring Kurdish to be taught alongside Arabic in areas of Kurdish majority; full Kurdish participation in government; and a constitutional amendment declaring that Iraq is made up of two nationalities, Arab and Kurdish.<sup>177</sup> Similar to the Bougainville situation, Iraqi Kurdistan has recently achieved substantial autonomy that is guaranteed by the Iraqi Constitution. Also, like Bougainville, Kurdistan has the right to its own constitution, as guaranteed by the Iraqi Constitution.<sup>178</sup> Pursuant to the same Iraqi Constitution, Iraqi Kurdistan and the central government must *share* power including in the competences of oil and gas development, antiquities, customs enforcement, water resources, education, environmental policy, electric energy distribution, and health policy.<sup>179</sup>

Based upon multiple agreements with the central government of Iraq providing autonomy to Kurdistan,<sup>180</sup> and the considerable shared competencies

173. Williams & Pecci, *supra* note 75, at 361.

174. *Id.* at 361.

175. *Id.* at 358. See generally Bougainville Peace Agreement, Bougainville-Papua N.G., Aug. 30, 2001, available at [http://www.usip.org/files/file/resources/collections/peace\\_agreements/bougain\\_20010830.pdf](http://www.usip.org/files/file/resources/collections/peace_agreements/bougain_20010830.pdf).

176. Williams & Pecci, *supra* note 75, at 358.

177. YILDIZ, *supra* note 28, at 45. See *Contemporary History, KURDISTAN REGIONAL GOVERNMENT* (June 28, 2010), <http://krg.org/articles/detail.asp?lngnr=12&smap=03010600&rmr=143&anr=18710> (discussing the autonomy given to Kurdistan through agreements with Iraq and the creation of the Kurdistan Regional Government resulting from an alliance of political parties).

178. Article 117, Section 5, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

179. *Id.*, art. 110.

180. YILDIZ, *supra* note 28, at 45. See *Contemporary History, KURDISTAN REGIONAL GOVERNMENT* (June 28, 2010), <http://krg.org/articles/detail.asp?lngnr=12&smap=03010600&rmr=143&anr=18710> (discussing the formation of an agreement between the Kurdish Democratic Party and Baghdad giving

between the central government and Kurdistan outlined in the Iraqi Constitution,<sup>181</sup> Iraqi Kurdistan has already made substantial steps toward the fulfillment of shared sovereignty along the path toward earned sovereignty. The substantial sharing of sovereignty between Iraqi Kurdistan and Baghdad hints at a future of independence, as “the period of shared sovereignty may also be designed merely as a way station to independence, with the substate entity exercising nearly all the power and authority of an independent state and equally sharing any remaining authority.”<sup>182</sup>

## 2. Kurdistan has already begun institution building

The Kurdistan region arguably began the process of institution building even before beginning the process of shared sovereignty. Institution building, the second step in the process of earned sovereignty, often, but not always, involves the aid of international organizations.<sup>183</sup>

In some circumstances, the process of institution building can exclude the international community.<sup>184</sup> For example, in the case of Northern Ireland, without international community involvement, the Good Friday Agreement established the Northern Ireland Assembly, a 108 member institution with both legislative and executive powers.<sup>185</sup> The Northern Ireland Assembly was intended to take on many of the sovereign functions originally provided to Northern Ireland by the United Kingdom.<sup>186</sup> The Good Friday Agreement also created two other consultative entities, a North/South Ministerial Council and a British-Irish Council, “intended to facilitate political stability during the period of shared sovereignty and the transfer of sovereign functions and authority to Northern Ireland.”<sup>187</sup> The North/South Ministerial Council is an executive body in Northern Ireland, charged with identifying a minimum of twelve areas for future cooperation between the United Kingdom and Northern Ireland.<sup>188</sup>

The case of Montenegro also indicates that the sub-state actor may begin the process of institution building prior to any period of agreed shared sovereignty and without participation by the respective state or the international community.<sup>189</sup> In Montenegro, prior to any shared sovereignty agreement with Serbia or the

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Kurdistan autonomy).

181. See Article 110, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (discussing the shared responsibility of both the federal and regional authorities in regards to public health policies, education, environmental policies, and the regulation of energy sources).

182. Williams & Pecci, *supra* note 75, at 361.

183. See *id.* at 363–64 (explaining that the international community has become increasingly more involved in creating domestic political and security institutions).

184. *Id.* at 364.

185. *Id.* at 364, n.55.

186. *Id.* at 364.

187. *Id.* at 364–65.

188. Williams & Pecci, *supra* note 75, at 364, n.56.

189. See *id.* at 365 (stating that the substate entity has the ability to create self-governing institutions prior to the end of the period of agreed shared sovereignty).

international community, the Montenegrin government created a Foreign Ministry with diplomatic offices abroad, a Ministry of Finance, and a Central Bank.<sup>190</sup> Additionally, the Montenegrin government, without approval from the State of Serbia, made independent decisions regarding its own economic policy by adopting first the Deutsch Mark and later the Euro as its national currency.<sup>191</sup>

In the case of the Kurds in Iraq, the process of institution building has evolved with the help of the international community in some circumstances, but also purely by Iraqi Kurdistan and the State of Iraq, or even unilaterally by the KRG. Since U.S.-British coalition forces provided a safe-haven for Kurds in the early 1990s during “Operation Provide Comfort” and enforced a no-fly-zone throughout Iraqi Kurdistan under “Operation Northern Watch,” Iraqi Kurdistan has continued to progress in terms of institution building.<sup>192</sup> While international involvement during the aftermath of the first Gulf War provided aid to the Iraqi government in tandem with Kurdistan, by 1994 to 1995 “about fifty INGOs were working in the Kurdistan Region, while only four were established in southern and central Iraq.”<sup>193</sup>

Together with international aid, the Kurdistan Region “constructed schools and hospitals in rural areas, procured educational materials and medicines, paid teachers’ salaries, implemented school feeding programs, rebuilt access roads, and resettled nearly two million Kurdish refugees to their original villages or urban housing.”<sup>194</sup>

The first Gulf War period also brought about the creation of the KRG through organized elections in May of 1992.<sup>195</sup> Following its creation, the KRG also devised other government programs; strengthened its security in the form of the *peshmerga*; and began drafting a Kurdish Constitution.<sup>196</sup> The fact that Iraqi Kurdistan has developed a standing military indicates substantial institution building and bolsters the argument that Kurdistan is not merely a sub-state within Iraq.<sup>197</sup>

The institution building in Iraqi Kurdistan further progressed through the end of the second Gulf War. The Kurds in Iraq have effectively and independently built the pillars of a democratic society, even more so than Northern Ireland, by creating an elected parliament, independent judiciary, education system, and business

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190. *Id.*

191. *Id.* at 365, n.58.

192. Carver, *supra* note 34, at 76.

193. NATALI, *supra* note 167, at 31.

194. *Id.*

195. See YILDIZ, *supra* note 28, at 44 (stating the KRG originated as a result of the 1989 Anfal campaigns).

196. See NATALI, *supra* note 167, at 30–33 (expressing INGOs contributed significantly to KRG stability, recovery, and rehabilitation).

197. Kelly, *supra* note 1, at 734 (“Political sub-units within federations are not typically armed.”).

friendly environment.<sup>198</sup> Further, the KRG, like the Montenegrin Government, created its own Foreign Ministry, began making contacts abroad, and opened foreign consulates within Iraqi Kurdistan.<sup>199</sup> Compared to other nations that have successfully engaged in the process of earned sovereignty, Kurdistan has certainly begun—if not completed—the process of institution building.

### 3. Iraqi Kurdistan may use a referendum on the Kurdish Constitution to achieve determination of final status

Iraqi Kurdistan could be poised to use its referendum on the drafted Kurdish Constitution to achieve the third and final mandatory step in the process of earned sovereignty—final determination of status.<sup>200</sup> This final step of earned sovereignty typically comes in the form of a referendum or a structured negotiation.<sup>201</sup>

In Montenegro, an agreement for the creation of the Union of Serbia and Montenegro provided for the allowance of separation of the Union by referendum after a period of three years.<sup>202</sup> On May 23, 2006, Montenegro successfully achieved final status as an independent sovereign nation by virtue of a referendum.<sup>203</sup> For Bougainville, the Bougainville Agreement provides for a referendum on separation from Papua New Guinea ten or fifteen years from the adoption of the agreement.<sup>204</sup> The Good Friday Agreement, on the other hand, provides that the British Secretary of State may call for a referendum on independence of Northern Ireland from the United Kingdom if it is likely that a majority of voters would favor separation.<sup>205</sup>

While Iraqi Kurdistan has not yet structured any kind of negotiation with the international community or with the State of Iraq, this reality does not doom any chance of using a referendum to achieve independence.<sup>206</sup> After all, “[a]s with the

198. See Siegfried Veisner et al., *The Kurdish Issue and Beyond: Territorial Communities Rivaling the State*, 98 AM. SOC'Y INT'L. L. PROC. 107, 112 (2004) (stating Kurdistan is a de facto state). See *id.* at 114 (“The Kurds with enormous industry and dedication and no little courage constructed all the institutions we associate with a state, including an armed force.”).

199. See *The Kurdistan Regional Government Department of Foreign Relations*, DEPARTMENT OF FOREIGN RELATIONS (Feb. 1, 2013, 9:41 PM), <http://dfr.krg.org/p/p.aspx?p=25&l=12&s=010000&r=332> (asserting that the Department of Foreign Relations was established in 2006).

200. Williams & Pecci, *supra* note 75, at 365.

201. *Id.*

202. SERBIA & MONTENEGRO CONST. art. 60.

203. See *Montenegro Vote Result Confirmed*, BBC NEWS (May 23, 2006, 10:23 AM), <http://news.bbc.co.uk/2/hi/europe/5007364.stm>; see *Montenegro Gets Serb Recognition*, BBC NEWS (June 15, 2006, 1:20 PM), <http://news.bbc.co.uk/2/hi/europe/5083690.stm> (confirming international recognition of Montenegro as an independent sovereign state after a national referendum).

204. Bougainville Peace Agreement, *supra* note 175, § C, ¶ 312(a); Williams & Pecci, *supra* note 75, at 366.

205. See Williams & Pecci, *supra* note 75, at 365–66 (explaining that the Good Friday Agreement is a “nuanced” approach).

206. See *id.* at 365 (explaining that *generally* final status is arranged through referendum *or* a structured negotiation, but not exclusively).

other elements of the earned sovereignty approach, the determination of final status must be tailored to the particular nuances of the situation on the ground.”<sup>207</sup> Iraqi Kurdistan has already engaged considerably with the international community resulting in Kurdish de facto autonomy, and has already engaged with the central government in Baghdad resulting in recognized legal autonomy. Also, the legality of a Kurdish Constitution as provided in the Iraqi Constitution could arguably represent consent by the State of Iraq to an eventual final determination of status of Iraqi Kurdistan.<sup>208</sup> According to the language of the Iraqi Constitution, the Kurdish Constitution is valid unless it contradicts the Iraqi Constitution.<sup>209</sup> Notably, the Iraqi Constitution does not speak to the validity or invalidity of the eventual separation of federal regions.

In particular, a referendum on the recent draft of the Kurdish Constitution stands as a possible instrument for final determination of status because much of the document’s language hints at Kurdistan’s supremacy over the federal government of Iraq.<sup>210</sup> Preliminarily, Article 1 of the Kurdish Constitution acknowledges that Kurdistan exists within the federal Iraqi state.<sup>211</sup> However, Article 3 states, “the Constitution and the laws of the Kurdistan Region are sovereign and supersede all laws issued by the Iraqi government.”<sup>212</sup>

Further, while Article 110 of the Iraqi Constitution provides for shared competences between the central government and regional governments,<sup>213</sup> Article 8 of the Kurdish Constitution expressly provides Iraqi Kurdistan the power to enter into agreements with foreign entities outside of these shared competences.<sup>214</sup> Most importantly, Article 8 constitutes an “opt-out” provision, whereby the Kurdish people choose to freely associate with the federal State of Iraq, but reserve the right to leave the federation. Article 7 states plainly:

The people of Iraqi Kurdistan shall have the right to determine their own destiny, and they have chosen, out of their own free will, to make Iraqi Kurdistan as a federal region within Iraq, as long as Iraq abides by the federal, democratic, parliamentary and pluralistic system, and remains committed to the human rights of individuals and groups, as stipulated in the Federal Constitution.<sup>215</sup>

The provision goes on to state that Iraqi Kurdistan may separate from the

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207. *Id.* at 366.

208. *See* Kelly, *supra* note 1, at 727 (noting that Article 13 of the Iraqi Constitution provides that regional constitutions may control in some areas).

209. Article 137, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

210. *See* Kelly, *supra* note 1, at 734–35 (describing multiple clauses in the Kurdish constitution that indicate expression of the Kurdish people’s right to self-determination).

211. KURDISTAN CONST. art. 1.

212. KURDISTAN CONST. art. 3.

213. Article 110, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

214. KURDISTAN CONST. art. 8; Kelly, *supra* note 1, at 735.

215. KURDISTAN CONST. art. 7.

federation if the central government violates the Iraqi Constitution, or fails to effectuate Article 140 of the Iraqi Constitution.<sup>216</sup> The language of Article 8 arguably constitutes a constitutional avenue for Iraqi Kurdistan to secede from the federal State of Iraq.<sup>217</sup>

#### ***D. Other Considerations Before Achieving Independence***

##### **1. The issue of consent for earned sovereignty**

Admittedly, even with a referendum on the Kurdish Constitution, the process of earned sovereignty generally requires either the consent of the state and sub-state entities involved in the process or the consent of the international community.<sup>218</sup> However, not all circumstances involving secession through earned sovereignty have required the consent of the state. For example, Kosovo's unilateral declaration of independence from Serbia in 2008 did not involve the consent of Serbia.<sup>219</sup> In fact, Serbia specifically declared Kosovo's declaration of independence "null and void."<sup>220</sup> Despite this lack of consent, as of November 28, 2012, ninety-six countries have recognized Kosovo as an independent sovereign state.<sup>221</sup>

While consent of the state involved in a particular sovereignty-based conflict is not necessarily required for independence through earned sovereignty, the consent of the international community is paramount to the recognition of a state seeking independent sovereign status.<sup>222</sup> Thus, ultimately the future of an independent Iraqi Kurdistan will depend upon the eventual consent of the international community if not the State of Iraq itself.<sup>223</sup>

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216. KURDISTAN CONST. art. 8. Article 140 of the Iraqi Constitution refers to the Central Government's requirement to return to Kurdistan all territories formerly considered to lie within Kurdistan, including the city of Kirku. Article 140, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005; Kelly, *supra* note 1, at 735.

217. See Kelly, *supra* note 1, at 735 ("Here, the right of the Kurdish people to self-determination is invoked—and not the autonomous kind, rather the full Wilsonian ideal.").

218. See Williams & Pecci, *supra* note 75, at 351 (stating that the conflicts are determined by the parties political concerns).

219. See Jure Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 VAND. J. TRANSNAT'L L. 779, 832–34 (2009) (explaining that Resolution 1244 puts severe restrictions on Serbia through constitutional law).

220. *Id.* at 834.

221. REPUBLIC OF KOSOVO MINISTRY OF FOREIGN AFFAIRS, *Countries that have Recognized the Republic of Kosova*, <http://www.mfa-ks.net/?page=2,33>.

222. See Williams & Heymann, *supra* note 77, at 440 ("Invariably the determination of final status for the sub-state entity involves the consent of the international community in the form of international recognition."); Williams & Pecci, *supra* note 75, at 355–56 ("[T]he determination of final status for the substate entity is conditioned on the consent of the international community in the form of international recognition.").

223. See Williams & Heymann, *supra* note 77, at 440 (using Kosovo and East Timor as examples for accomplishing final status).

## 2. Territorial integrity and the right to self-determination

The future of an independent Kurdistan through secession from Iraq also introduces conflict between the competing rights of sovereignty and self-determination. Traditional notions of sovereignty argue that the territorial state has ultimate and absolute authority over its boundaries and the policies within those boundaries.<sup>224</sup> Evidence suggests, however, that the modern idea of sovereignty is not absolute and has on occasion been eclipsed by the right of self-determination.<sup>225</sup> While states remain the primary actors and decision makers in the international community, sovereignty has become a more limited and flexible concept.<sup>226</sup> This shift towards a weakening of sovereignty has been buoyed by globalization, which has promoted strength and awareness of national, cultural, and ethnic identity and a call for the dissolution of empires and autocracies.<sup>227</sup>

In the case of Kurdistan separating from Iraq, the issue of territorial integrity is arguably already moot.<sup>228</sup> Iraq has already been subject to considerable violations of its sovereignty. To say that a Kurdish separation would somehow be an unacceptable violation of Iraq's sovereignty after numerous U.N.-sanctioned violations of its sovereignty<sup>229</sup> is simply illogical. Indeed, Iraq has arguably been a failed state since its inception, "a product of skewed colonial engineering that forced groups with long histories of conflict to live under central authority in Baghdad."<sup>230</sup> The oppression of the Kurds throughout history, the humanitarian violations by Saddam Hussein, and the U.S. invasion and subsequent occupation of Iraq have disrupted the territorial integrity of the State far more than would the gradual separation of Iraqi Kurdistan.<sup>231</sup> As Kurdistan has largely operated as an autonomous state since the end of the first Gulf War,<sup>232</sup> a separation of Kurdistan from Iraq would thus not be a drastic deviation from the normal historical pattern of the State of Iraq; it would basically continue the status quo of self-governance in Kurdistan; and would not be a substantial affront to the principle of territorial

224. Veisner, *supra* note 198, at 109.

225. *See generally id.* (discussing multiple incidents in recent history where the power of sovereignty has been overcome by the right of peoples to self-determination); Williams & Pecci, *supra* note 75, at 351–54 (comparing the competing approaches of "self-determination first" and "sovereignty first" in sovereignty based conflicts).

226. *See* Veisner, *supra* note 198, at 108 (explaining that due to globalization and the communications revolution other international decision makers have entered the decision making).

227. *See id.* at 109 (stating that the communication revolution has been a major contributing factor in globalization).

228. *See id.* at 112 ("Since 1991, when the Coalition no-fly zone established a Kurdish protectorate, Iraq's sovereignty has been increasingly curtailed by successive UN resolutions.").

229. *See id.* (explaining it would be better to allow the Coalition to have the primary power and the U.N. to approve and provide technical assistance).

230. *Id.* at 111.

231. *See* Gregory J. Ewald, *The Kurds' Right to Secede Under International Law: Self-Determination Prevails Over Political Manipulation*, 22 DENV. J. INT'L L. & POL'Y 375, 401 (1993–1994) (claiming the Kurds independence would provide them with human rights and rid state sponsored genocides).

232. *Does Independence Beckon?*, *supra* note 57.

integrity.<sup>233</sup>

### 3. International agreement or unilateral secession?

The clearest distinction between Iraqi Kurdistan and the examples of earned sovereignty in Bougainville, Montenegro, and Northern Ireland, lies in the lack of an agreement with either the sovereign state of Iraq or an international organization providing a timeline for determination of final status.<sup>234</sup> In order to increase the odds of international acceptance of a secession of Iraqi Kurdistan, the Kurds should seek an agreement with the international community and the United Nations regarding a determination of final status, as occurred in Kosovo.<sup>235</sup> Unfortunately, civil war in Iraq—is a genuine possibility given the rise of sectarian violence since the exit of American forces<sup>236</sup>—which could bring about a Kurdish secession faster than international agreement. If the State of Iraq crumbled into civil war, resulting in the dissolution of the federal republic and a loss of sovereignty, then a secession or creation through partition of Iraqi Kurdistan would not violate the principle of territorial integrity.<sup>237</sup>

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233. See Ewald, *supra* note 231, at 401 (explaining that although Iraqi Kurds have faced adverse situations, they have established viability in both economics and politics).

234. See *supra* Part IV for a discussion of the final step of earned sovereignty, Determination of Final Status.

235. See *Kosovo*, *supra* note 138 (declaring Kosovo, after seventeen years of struggle, declared its independence from Serbia, marking a determination of final status).

236. See Peter van Buren, *The U.S. is Moving Onward*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/roomfordebate/2012/02/09/does-the-us-have-a-plan-for-iraq/the-us-is-moving-onward-from-iraq> (“The U.S. has finally acknowledged that Iraq is not its most important foreign policy story, and that America’s diplomats cannot survive on their own in the middle of a civil war.”); Christopher Preble, *Iraq’s Future is in Iraq’s Hands*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/roomfordebate/2012/02/09/does-the-us-have-a-plan-for-iraq/iraqs-future-is-and-should-be-in-iraqs-hands> (“[A] small group of ‘true believers’ . . . assert[s] that a large U.S. presence might forestall a possible civil war and counteract Iran’s rising influence.”); Kenneth M. Pollack, *No Easy Solution in Iraq*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/roomfordebate/2012/02/09/does-the-us-have-a-plan-for-iraq/iraqs-future-is-and-should-be-in-iraqs-hands> (“First, Iraq is an incredibly fragile state whose democratic institutions are weak and mostly overwhelmed by the residual fear, anger, avarice and competing aspirations of its various leaders and communities. It could easily slip into unstable dictatorship, a failed state or renewed civil war.”); Dagher, *supra* note 6 (“The crisis, which politicians said has brought Iraq to the brink of civil war, erupted in December 2011, just as the last American troops were leaving.”).

237. See Anthony J. Christopher, *Secession and South Sudan: An African Precedent for the Future?*, 93 S. AFR. GEOGRAPHICAL J. 125, 126 (2011) (“The unilateral secession of a state from a federation is more problematical and although it may be open to interpretation as an act of dissolving the union, generally within the international community it has been interpreted as secessionism and therefore condemned. Such an act represents a fundamental challenge to the concept of individual state sovereignty which lies at the centre of the international political system.”); Nathan Richardson, *Breaking Up Doesn’t Have to be so Hard: Default Rules for Partition and Secession*, 9 CHI. J. INT’L. L. 685, 688 (2009) (“Bangladesh, East Timor, Eritrea, Biafra, Chechnya, and the constituent parts of the former Yugoslavia have all either seceded, or attempted to do so, amid violence . . .”). See *supra* Part IV.C for discussion of the competing interests of territorial integrity and secession.

#### 4. Heightened autonomy in place of independence

While most often sub-state entities employ the process of earned sovereignty as a way station toward independence, the determination of final status does not have to yield full independence.<sup>238</sup> Rather, the determination of final status of the sub-state may simply lead to greater autonomy.<sup>239</sup> The only issue with this option appears to be whether or not Iraqi Kurdistan can achieve much, if any, more autonomy without being a sovereign and independent state. Again, consensus appears to be that Kurdistan already operates as a de facto state.<sup>240</sup> Using the process of earned sovereignty simply to achieve heightened autonomy would likely not lead to much progress in the case of Iraqi Kurdistan given the years of self-governance.

### VI. CONCLUSION

A referendum on the Kurdish Constitution is by no means imminent and such a referendum may not necessarily precipitate a Kurdish attempt at secession. The political obstacles are, indeed, substantial. However, the process of earned sovereignty could quite possibly provide Iraqi Kurdistan an avenue to eventually, if not immediately, move from its current state as a de facto state to a recognized independent sovereign state. As with the aforementioned examples of successful efforts at earned sovereignty, the process can take years. While earned sovereignty does not represent a panacea for the Kurdish independence movement, its recent success in settling sovereignty-based conflicts between sovereign states and semi-autonomous regions within those states can provide a glimmer of hope for Kurdistan's future, particularly in light of the considerable steps Iraqi Kurdistan has already taken.

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238. See Williams & Pecci, *supra* note 75, at 365 (determining final status is usually done by referendum or through structured negotiations).

239. *Id.*

240. See *Does Independence Beckon?*, *supra* note 57 (“[N]ot a single sign or hint that the place is officially part of a federal Iraq was in evidence”).