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# REPORT DOCUMENTATION PAGE

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| 1. REPORT DATE *(DD-MM-YYYY)* | 2. REPORT TYPE | 3. DATES COVERED *(From - To)* |
|---|---|---|
| 19-05-2019 | Capstone | |

**4. TITLE AND SUBTITLE**
United States interests in the debate on self-determination of Iraqi Kurds

**5a. CONTRACT NUMBER**

**5b. GRANT NUMBER**

**5c. PROGRAM ELEMENT NUMBER**

**6. AUTHOR(S)**
Caetano, Christina, R, LCDR

**5d. PROJECT NUMBER**

**5e. TASK NUMBER**

**5f. WORK UNIT NUMBER**

**7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)**

**8. PERFORMING ORGANIZATION REPORT NUMBER**

**9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)**
Civilian Institutions Office (Code 522)
Naval Postgraduate School
1 University Circle, Herrmann Hall Rm HE046
Monterey, CA 93943-5033

**10. SPONSOR/MONITOR'S ACRONYM(S)**
NPS CIVINS

**11. SPONSORING/MONITORING AGENCY REPORT NUMBER**

**12. DISTRIBUTION AVAILABILITY STATEMENT**
Approved for public release; distribution is unlimited

**13. SUPPLEMENTARY NOTES**

**14. ABSTRACT**

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**15. SUBJECT TERMS**
Iraq, Kurds, Self-determination, group rights, autonomy

| 16. SECURITY CLASSIFICATION OF: | | | 17. LIMITATION OF ABSTRACT | 18. NUMBER OF PAGES | 19a. NAME OF RESPONSIBLE PERSON |
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| a. REPORT | b. ABSTRACT | c. THIS PAGE | | | 19b. TELEPONE NUMBER (*Include area code)* |
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# CAPSTONE: UNITED STATES INTERESTS IN THE DEBATE ON SELF-DETERMINATION OF IRAQI KURDS

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**April 29, 2019**

**Abstract**

This article will briefly examine the legal background of minority and group rights, apply those concepts to the Iraqi Kurds, and establish possible Kurdish claims under international law. Next, it will analyze the political, regional, and legal factors affecting the exercise of group rights by the Iraqi Kurds. Finally, it will explore the position of the United States towards the exercise of group rights by the Iraqi Kurds and how this will impact both US policy and international law. Under international law, the US should apply the principle of self-determination as practiced in the post-Cold War era towards the Iraqi Kurds.[1]

## I. Legal Background

### Group Rights vs. Individual Rights

Defining terms like groups, minorities, peoples, and nations proves almost as difficult as being able to identify who constitutes these groups. Not all persons or groups have internationally protected rights, but to have these rights an association must be a "group." Defining a group is therefore critical in determining the rights of the individuals, rights of the group, and responsibilities of states in relation to them.

Scholars and legal practitioners have developed two factors for group criteria: 1. self-perception of the group as distinct from others along with the desire of the individual members of the group to identify themselves as a group and 2. objective characteristics which distinguish the group from the remainder of the population.[2] These characteristics may include common language, history, ethnicity, religion, or territory.

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[1] Susanna Mancini, *Secession and Self-Determination*. In (Ed.), The Oxford Handbook of Comparative Constitutional Law. : Oxford University Press, (2012) Retrieved 2 Dec. 2018, from http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199578610.001.0001/oxfordhb-9780199578610-e-25.

[2] Olivia Q. Goldman, *The Need for an Independent International Mechanism to Protect Group Rights: A Case Study of the Kurds*, 2 Tulsa J. Comp. & Int'l L. 46-47, 90 (1994).

Francesco Capotorti, a Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, defines a minority group as:

> A group which is numerically inferior to the rest of the population of a state and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[3]

Thus, the Kurds, who have multiple languages and religions but share a common history, ethnicity and geography and who self-identify themselves as a group meet the definition of a minority. Goldman notes a "'minority' also has the political implication that the group is in a nondominant position in the state in which it exists."[4] This too holds true for the Kurds, who range from 10% to 18% of the population in the states in which they inhabit.[5]

Group rights can be traced as far back as the 1648 Treaty of Westphalia. The Treaty was between various European powers and the Holy Roman Empire. It guaranteed religious freedom to certain religious minorities.[6] From here, group rights appear in various treaties demonstrating a shift by the international community to consider treatment by a state of its citizens to no longer be solely a domestic concern, but one of international concern.[7]

It is not until the League of Nations is formed following World War I that the protection of ethnic and other minorities gains significant attention in the international legal order. The treaties formed after World War I generally had three things in common: 1. granted legal equality to individuals; 2. sought to preserve group characteristics and traditions, and 3. did not

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[3] Goldman at 90 citing FRANCESCO CAPOTORTI, STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS, AND LINGUISTIC MINORITIES 5, U.N. Doc. E/CN.4/Sub.2/384/-Rev. 1, U.N. Sales No. E.78.XIV.I (1979).
[4] Goldman at 47.
[5] Explore the Kurdish Diaspora Map and History, The Kurdish Project, https://thekurdishproject.org/kurdistan-map/kurdish-diaspora/.
[6] Treaty of Westphalia, Jan. 11, 1649, Fr.-Holy Roman Empire, 1 Consol. T.S. 383.
[7] Goldman at 49.

apply these new rights of individuals and groups to the states drafting the treaties.[8] The League of Nations was eventually dissolved and replaced by the United Nations (UN).

After the experiences of World War II, there was a shift in focus from group rights to individual rights. Group rights were thought to be adequately addressed by the principle of nondiscrimination, which "prohibits distinctions based on group characteristics such as race, religion, language, or nationality."[9] This shift demonstrates a tension between group rights and individual rights, because if individual rights guarantee the same protections as group rights, then group rights seem to be superfluous.[10] Accordingly, the United Nations system neither provides for the judicial enforcement of group rights, nor is an individual petition procedure available for petitions concerning the violation of collective rights.[11]

**Self-Determination**

Self-determination, is the right to the free determination of internal and external political status, and encompasses political, economic, social and cultural aspects.[12] UN Charter Article 1 declares one of the purposes of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[13] In addition to this foundational language, the United Nations has addressed the rights of minorities based on national or ethnic origin, racial discrimination, religion and language in multiple Conventions and Declarations.[14] Collectively, these instruments broaden the scope from

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[8] Goldman at 50.
[9] Goldman at 52; See also U. N. Charter art 55.
[10] Goldman at 52.
[11] Goldman at 62-63.
[12] Goldman at 57.
[13] U.N. Charter art 1.
[14] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., Part I, at 71, U.N. Doc. A/810 (1948) ; Convention on the Prevention and Punishment of the Crime of Genocide, concluded Dec. 9, 1945, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) ; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 174 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1976, 999 U.N.T.S. 3 (entered into force Jan. 3, 1976); Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, G.A. Res. 135, U.N. GAOR, U.N. Doc. A/RES/47/135 (1992).

protections of individuals to rights of both individuals and groups.

The right to self-determination is juxtaposed against the right of sovereignty or territorial integrity of states with neither being an absolute right. Instead, "each is limited by other rights and international obligations."[15]

Hadji compares the rationale in favor of self-determination over territorial integrity by appealing to the ideals behind self-determination, then contrasting those to the values associated with colonialism. He argues, "The strongest rationale for declaring self-determination claims superior to territorial integrity claims is very simple: democratic self-government is more righteous than the feudal, undemocratic, and oppressive values associated with preserving territorial boundaries."[16]

As Goldman observes, "Governments often fear that respecting these [minority] rights will encourage separatist movements and lead to the dissolution of the states"[17] However, the right to the free determination of internal and external political status does not necessarily have to mean independence. As Hannum notes, "In the context of decolonization, self-determination meant immediate independence, but there has been continuing disagreement over its applicability to noncolonial situations."[18] Outside of independence, self-determination can be expressed in the form of "comparative arrangements for power-sharing, devolution, federalism, confederation, territorial and functional autonomy, self-government, special participation rights for minorities or regional groups, proportional representation, and similar arrangements."[19]

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[15] Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, 77 Foreign Affairs 13 (1998).
[16] Philip S. Hadji, *The Case for Kurdish Statehood in Iraq*, 41 Case W. Res. J. Int'l L. 513, 542 (2009) at 524 citing Lea Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 16 YALE J. INT'L L. 177, 184 (1991).
[17] Goldman at 65-66.
[18] Supra note 15.
[19] Supra note 15.

## II. Examination of Kurds

### Who are the Kurds?

The definition of groups, minorities, peoples, and nations were discussed in the previous section. Examining who the Kurds are will assist in determining to which rights they are entitled. The Kurds "are an Aryan people and an ethnic group distinct from the Turks, Persians and Arabs…"[20] Their language, customs, traditions and internal tribal structures are distinct from those populations. Geographically, the Kurdish population spans between Iran, Iraq, Syria, and Turkey. With approximately 30 million people, the Kurds are the largest ethnic group in the world without a state.[21] If "a nation is a politically active ethnic group," then the Kurds are a nation.[22] Throughout history the Kurds struggled for political independence against Mongols, Persians, Assyrians, Babylonians, and the Ottoman empire. Instead of gaining independence, they were consistently incorporated as minority populations by these larger conquering states. During this time, the Kurds were consistently resisting their rulers, which led to tragedies like forced relocations and massacres.

### Overview of the Legal History of Kurds

The collapse of the Ottoman empire after World War I brought hope to the Kurds for an independent state. The Treaty of Sevres 1920 described how the Kurdish state would be established, including a description of the boundaries. However, when the Turkish nationalist movement overthrew the monarchy to establish the Republic of Turkey, they rejected the treaty.[23] The Treaty of Lausanne 1923 took its place. It revoked Kurdish independence in exchange for

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[20] Michael J. Kelly, *The Kurdish Regional Constitutional 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, 808 (2010)
[21] Kelly at 710 citing NADER ENTESSAR, KURDISH ETHNONATIONALISM 2-3 (1992).
[22]Monica Duffy Toft (2012) Self-Determination, Secession, and Civil War, Terrorism and Political Violence, 24:4, 584 DOI: 10.1080/09546553.2012.700617

[23] Kelly at 712, 715.

guarantees of Ottoman Empire debts and ceding certain territorial claims.[24] Following this, the cycle of persecution and resistance continued until 1946 when an independent Kurdish state was established in Mahabad, but it collapsed the same year with the predictable result of continued fighting. Then, in 1958 with the overthrow of the Iraqi monarchy, the new Iraqi constitution recognized Kurdish "national rights."[25] In the ensuing decades, Iraq underwent much internal turmoil where the struggle of the Kurds for their group rights remained constant. Finally, a peace accord was signed in 1970 between the Iraqi government and the Kurdish parties granting Kurdish autonomy, recognizing Kurdish as an official language, and amending the constitution to state that: "the Iraqi people is made up of two nationalities, the Arab nationality and the Kurdish nationality."[26]

The next legal event of significance is the systematic persecution of the Kurds by the Iraqi government during the Anfal Campaign of 1988. Here, the Iraqi regime killed tens of thousands of civilians and fighters and used poison gas against civilians in violation of multiple human rights treaties for which Iraq is a party.[27] In response to this and other actions by the regime, the international community responded by waging the Gulf War. During the Gulf War, Coalition Forces created a "safe haven" for Kurds and internally displaced persons in northern Iraq.[28] Although this region was protected from the Iraqi regime, a civil war between the two leading Kurdish parties broke out. Eventually, a peace agreement brokered by the US ended the civil war in 1998.

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[24] Kelly at 715.
[25] See Article 3, Chapter 1, The Constitution of the Republic of Iraq of 1958.
[26] Iraqi Kurdistan profile - timeline, BBC News (2017), https://www.bbc.com/news/world-middle-east-15467672.
[27] Ratification Status of Iraq, TREATY BODIES TREATIES, U.N. Human Rights Comm., https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=82&Lang=EN. See Annex for a table of human rights treaties to which Iraq is either a signatory or a party.

[28] United Nations Resolution 688, 1991.

A few years later, the ruling regime was removed following the Iraq war. It was replaced with an interim government with an interim constitution in the form of the Transitional Administrative Law. Another source of international protection was created in the form of the establishment of Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI). UN Security Council Resolution 1546 (2004) mandated UNAMI, inter alia, to "promote the protection of human rights, national reconciliation, and judicial and legal reform in order to strengthen the rule of law in Iraq".[29] This mission continues to be renewed at the request of the government of Iraq.

The removal of the regime and installation of an interim government created opportunities for Kurdish participation in national issues. With the two parties (the KDP and the PUK) allied, they were able to gain significant representation in the interim parliament during the 2005 national elections, even having a Kurdish leader elected as interim Iraqi president.[30] Leveraging their new political power, the Kurds pushed for more favorable measures in the new Iraqi constitution, which was signed in 2005.

When the Kurdish Regional Government successfully took over responsibility for security in the Kurdish provinces from US forces in 2007, a new threat, in the form of ISIS, needed to be stopped. Although article 140 of the Constitution required a referendum on whether Kirkuk province should become part of Iraqi Kurdistan to be held in 2007, all parties agreed to postpone the referendum to counter the greater threat of ISIS. While fighting ISIS, the Iraqi government struggled against both internal and external threats. These included sectarian violence, Iranian influence supporting powerful Shia militias, ISIS terrorism, and corruption to name a few. This environment, combined with disputes over oil resources and funding further

[29] S.C. Res. 1546, U.N. Doc S/RES/1546 (June 8, 2004).
[30] Supra note 26.

strained the relationship between the federal government and the KRG. As a result, the KRG sought to hold an independence referendum in 2014. With pressure from the coalition and negotiations with Baghdad they agreed to suspend the referendum. Gutman describes the Kurds four major demands as follows:

- Resolving within a year the status of the oil-rich Kirkuk region, which is claimed by Kurds and Arabs. Whether to incorporate it into the Kurdish region was to have been decided in a referendum by 2007, according to the 2005 Iraqi Constitution, but the vote was never held.
- Lifting for three months the moratorium on Kurdish direct sales of oil, during which time the Kurds could export 140,000 barrels a day. At the end of that period, negotiations would begin on a permanent agreement on Kurdish oil sales.
- The government in Baghdad paying the blocked Kurdish government salaries and recognizing the peshmerga militia as a component of the national defense forces, entitled to modern equipment and weapons.
- Granting Kurdish authorities complete control of the region's airspace.[31]

Two years later, one year after what was negotiated, the Kurds again sought to have a referendum on independence. Now, ISIS was largely defeated, but the government in Baghdad remained mired in conflict, corruption, and ineffectiveness. In September 2017, the Kurds held the independence referendum in the face of international opposition. One of the consequences of the referendum was the resignation of the KRG president, a member of the KDP. In November 2017, the Iraq Federal Court ruled the Kurdish referendum unconstitutional. However, the validity of this decision is challenged by the KRG, because under the Iraq constitution, the highest court still has not been established.[32]

The backlash from Baghdad and the international community to the independence referendum was swift. Territories reclaimed from ISIS held by Kurdish forces were turned over to Baghdad, the international airport was shut down, and other economic measures were taken

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[31] Roy Gutman, KURDS AGREE TO POSTPONE INDEPENDENCE REFERENDUM, THESTAR.COM (2014), https://www.thestar.com/news/world/2014/09/05/kurds_agree_to_postpone_independence_referendum.html.
[32] Kurdish Regional Government Cabinet, REPORT: THE CONSTITUTIONAL CASE FOR KURDISTAN'S INDEPENDENCE THE KURDISH LANGUAGE (2017), http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=55856.

against the Kurds as Baghdad reasserted its control.[33] Baghdad allegedly negotiated unilaterally with the PUK to allow Iraqi troops to take over Kirkuk and other territories.[34] The PUK may have seen this as gaining favor with Baghdad, but it caused further divide between the two major Kurdish parties.

The divide between Kurds is a recurring obstacle to their independence. How the divide between Kurdish people in different states has been used by those states to prevent Kurdish independence will be discussed further in the next section. It will be demonstrated that "the Kurds are not a monolithic force, but rather are several divided groups with relatively small spheres of influence. They operate within a larger context, defined by regional rivalries and global power plays."[35]

The divide between Kurds within Iraq is illustrated through divergent strategies by the major parties. The KDP seeks to harness the support of the international community and slowly work with Baghdad for an end goal of independence. In contrast, the PUK strives for independence from Baghdad, immediately. They view the KDP's strategy as too conservative. This can be a problem because rather than exclusively seeking to ensure their material well-being as the KDP is doing, the PUK may rationally risk confrontation with the state and violence as a means to secure their cultural and historical livelihood—a livelihood which links them to a particular place, for instance.[36] This is certainly the case with the PKK in Turkey, to the point where Turkey considers the PKK a terrorist organization. The fear by the KDP, Iraq, and international actors is that the PUK may follow the example set by the PKK using violence

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[33] Al Jazeera, IRAQI KURDS VOTE IN CONTROVERSIAL REFERENDUM GCC NEWS | AL JAZEERA(2017), https://www.aljazeera.com/news/2017/09/iraqi-kurds-vote-independence-referendum-170925032733525.html.
[34] Loveday Morris, HOW THE KURDISH INDEPENDENCE REFERENDUM BACKFIRED SPECTACULARLY, THE WASHINGTON POST (2017), https://www.washingtonpost.com/world/how-the-kurdish-independence-referendum-backfired-/2017/10/20/3010c820-b371-11e7-9b93-b97043e57a22_story.html?utm_term=.1191382b9885.
[35] Sam Davies, Kurdish dreams and divisions, Foreign Brief (2016), https://www.foreignbrief.com/middle-east/kurdish-dreams-divisions/.
[36] Toft at 586 citing John Agnew, Place and Politics: The Geographical Mediation of State and Society (Boston, MA: Allen & Unwin, 1987).

instead of diplomacy to achieve their goals. It is unclear whether this threat undermines the KDP's diplomacy or strengthens it within the international community.

For Iraq, the votes in the referendum on independence demonstrate a divide amongst the Kurds roughly along the same borders as the Kurdish civil war.[37] The participation rate in Sulaymaniyah which supports PUK barely exceeded 55%, but reached up to 90% in Erbil, which supports KDP. Total turnout reached 72%.[38] Although both parties supported the referendum, it was the PUK who struck a deal with Baghdad after the fact. Accordingly, Baghdad's sanctions following the referendum exploited the divide between the Iraqi Kurds by rewarding the primarily PUK loyal area of Sulaymaniyah, and punishing the primarily KDP loyal area of Erbil. Internal to the Kurds, the pairing of the PUK with Baghdad against the KDP reinforced old grievances between the parties. However, overall, the punitive actions by Baghdad have cemented a sentiment of fierce nationalism in the Kurds.[39] For Iraqi Kurds, "this internal Kurdish rivalry and the unwillingness of Baghdad to engage in discussions over independence, along with Iranian interference, have left [Kurdish Region of Iraq] at an impasse."[40]

**What do the Kurds want?**

The referendum on independence showed 92% in favor of independence.[41] Support for independence demonstrates the frustrations of the Kurdish people with the government of Iraq.

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[37] KRG Referendum: A Unilateral Decision within a Polarized Region, ARAB REFORM INITIATIVE, https://www.arab-reform.net/en/node/1245. (KRG Referendum).
[38] *Id.*
[39] Morgan Kaplan, Why the 2018 Election Season Isn't Over for the Kurds, Lawfare (2018), https://www.lawfareblog.com/why-2018-election-season-isnt-over-kurds.
[40] Supra note 37.
[41] *Id.*

Given the obstructions to Kurdish issues from 2006-2014 by Prime Minister Maliki's government, the historic grievances against the Iraqi government, and recent sanctions placed on the Kurdish Region, it is no wonder why they would support cutting ties with Baghdad.[42] Anderson rightly predicted "that the parties [Iraq and KRG] will likely not be able to implement these provisions [constitutionally required census and referendum] on their own. Instead, doing so will almost certainly require renewed engagement from the international community."

While awaiting engagement from the international community and "absent any credible legal mechanism for resolving the territories' status, the KRG began to expand its efforts to gain leverage in any future conflict or negotiation by acquiring *de facto* control of—and building institutional ties to—strategic areas."[43] Land is important because "for ethnic groups, territory is invariably tied to the group's identity. Control over homeland means a secure identity."[44] Toft contrasts this with states where "control over territory is directly linked to physical survival: all other things being equal, more territory means more physical security from conquest or from coercion."[45] So, the Kurdish struggle can be defined as a ''sons of the soil movement[s]'' involving territorial conflicts with a peripheral ethnic minority.

As illustrated by the above timeline, this type of conflict lasts a long time primarily "because the central government believes time is on its side as compared to the minority," which is exactly the situation playing out between the central government in Baghdad and that in Erbil.[46]

Because its authors addressed major disputes in ambiguous terms in hope that future political processes would resolve them, Iraq's Constitution sacrifices clarity for consensus. [47]

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[42] KRG Referendum.
[43] Scott R Anderson, The Constitutional Context for Iraq's Latest Crisis, Lawfare ( 2017), https://www.lawfareblog.com/constitutional-context-iraqs-latest-crisis.
[44] Toft at 585.
[45] Toft at 585.
[46] Toft at 592 citing James D. Fearon, ''Separatist Wars, Partition, and World Order,'' Security Studies 13 (2004): 394–415.

According to the Kurdish Region Government Report "The Constitutional Case for Kurdistan's Independence," the Kurds present a convincing argument for seeking "constitutional secession" supported by the right to self-determination under the UN Charter. [48] They argue that Iraq has failed to be established as a federation as the constitution requires, because 12 years after the ratification of the constitution, there is still no federal second chamber and no valid federal supreme court.[49] This, combined with other instances of noncompliance of constitutional provisions provides the foundation in support of Kurdish independence.

Contrary to their current stated goal of independence, the Kurds have not always sought secession. It is true that the Kurds are actively courting the international community for support. For example, the first two times it sought to have a referendum, it postponed it partially due to lack of support from the United States. Kurdish forces served as a reliable military partner to the US when fighting both the regime and later ISIS in an effort to demonstrate their ability to secure their borders. While positioning themselves for independence from Iraq, the Kurds continue to reassure their neighbors that they wish to maintain current borders. Previously, the Kurds have at least demonstrated a willingness to work within the framework of Iraq. This may have been due to political pressure, lack of international support, Kurdish internal conflicts, or the strength of the Iraqi state. Working within the framework took the form of participating in national elections, having representatives in the government of Iraq, and assisting in drafting Iraq's constitutions. Zadeh observes "there seems to be a correlation between Kurdish nationalists' demands for self-determination and Kurdish political agents' attempt to familiarize the outside world with Kurds' pursuit of statehood."[50] This supports Alex Danilovich's conclusion that "the

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[47] Supra note 43.
[48] Kurdish Regional Government Cabinet, REPORT: THE CONSTITUTIONAL CASE FOR KURDISTAN'S INDEPENDENCE THE KURDISH LANGUAGE (2017), http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=55856.
[49] *Id.*

KRG's significant efforts to assert Kurdish identity and to make itself a player in international relations do not reflect an intention to change the status quo per se."[51] It is possible that the Kurds are still willing to accept an alternative to secession from Baghdad.

## III. Political and regional factors affecting Iraqi Kurds

There is a difference between what is right, what is legal, and what serves the national interest of a state. Based on historical atrocities, the internationally recognized right to self-determination, and Montevideo Convention criteria of statehood, it may be "righteous" for the Kurds to have their own independent state, but thus far the international community has resisted attempts by the Iraqi Kurds to make independence legal. Doing so does not serve the national interests of multiple states such as Iran, Syria, and Turkey. The national interests of Iraq and the United States with respect to the Kurds will be discussed in a separate section.

Goldman, citing a statement by Kurdish Representative to the Unrepresented Nations and Peoples Organization, observes, "the dominant pattern in the behavior of the states of Turkey, Syria, Iraq, and Iran in relation to the Kurds can be described as follows:

> [i]n normal times a policy of assimilation, a forced integration and a policy of and denying Kurdish identity. In times of conflicts a ruthless policy of destruction near genocidal measures and methods; in times of strong Kurdish resistance, of those states, they especially in times of weakness in the political foundations cede some rights and some form of recognition.[52]

Support for various Kurdish populations is often fueled by states in the region using the Kurds to weaken governments of competing states. Conversely, oppression of the Kurdish populations is conducted by governments to strengthen their power over people and territories.

### International Actors

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[50] Yoosef Abbas Zadeh & Sherko Kirmanj, *The Para-Diplomacy of the Kurdistan Region in Iraq and the Kurdish Statehood Enterprise*, 71 The Middle East Journal 587–606 (2017).
[51] Zadeh at 596 citing Alex Danilovich, Iraqi Federalism and the Kurds: Learning to Live Together (Burlington, VT: Ashgate, 2014), p. 104.
[52] Goldman at 85 citing Statement by Kurdish Representative to the Unrepresented Nations and Peoples Organization (1991) (on file with the author).

**Iran**

Iranian territory is composed of multiple minorities. After WWI Iran faced a series of uprisings led by minorities, including the Iranian Kurds. These uprisings were successfully repressed by the Iranian government. During WWII when the British and Soviet forces were to leave Iran, the Kurds attempted to form an independent state. The attempt was thwarted by Iranian troops who regained control of the rebellious region and then banned expression of the Kurdish identity. Later, in the 1950s the Iranian government "maintained the dual policy of supporting Kurds in Iraq but suppressing those in Iran. In response, the Iraqi government provided support for Iranian Kurds until the signing of the Algiers Agreement in 1975."[53]

During the Islamic Revolution of 1979, the Kurds again sought separation. The new government "refused to recognize the Kurds as a minority. In fact, the only minorities recognized in the new constitution were religious minorities."[54] Following the end of the Iran-Iraq war in 1988, the Kurds entered a series of negotiations and hostilities with the government. Due to their coordination with Iraqi Kurds during the war, the Kurdish region in Iran remains under military control. Here, the Kurds face restrictions on cultural and religious expression, as well as suffer violations of human rights.[55]

Iranian involvement in Iraq continues to affect the Iraqi Kurds. Iraq Prime Minister Maliki's policies towards the Sunnis set conditions for the birth of ISIS.[56] Iraqi security forces were soon overwhelmed by the growth of ISIS. In response, Iraq allowed the formation of Popular Mobilization Forces (PMF) composed of Shiite militias to battle against ISIS. The PMF are backed by Iran, which is seeking to increase its influence in Iraq. "Shiite militias do not

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[53] Goldman at 83 citing David McDowall, THE KURDS: A NATION DENIED 12 (Minority Rights Group ed., 1992) at 70-71.
[54] Goldman at 83 citing McDowall at 74.
[55] Goldman at 83 citing McDowall at 77-79.
[56] Emma Sky, Mission Still Not Accomplished in Iraq: Why the United States Should Not Leave. *Foreign Affairs, 96*(6), 9-15, 15A.

submit to government control, but they are entrenched within state institutions and exploit state resources."[57] The number, power, and successes of the PMF is a threat to the legitimacy of the central government. They create a competition for influence between the central government of Iraq and Iranian influences.[58] The need for security reform to counter this influence will be discussed later in this paper. Overall, the interplay between Iran and Iraq has caused the Kurds of both states to be used as pawns by those states. The ongoing security crisis in Iraq, fomented by Iran, gives the Iraqi Kurds an opportunity to collectively assert themselves in negotiations with the central government.

**Turkey**

Turkey's relationship with the Kurds inside and outside of its borders has been one of mixed hostilities, non-recognition, and tolerance. Like Iran, Turkey denies the identity of its own Kurdish population, but leverages neighboring Kurds to its advantage. The 1920 Treaty of Sevres after WWI between the Allies and the Ottoman Empire is the strongest international document in support of Kurdish independence. It contains provisions for interim autonomy for the predominantly Kurdish area of Turkey and ultimately full independence.[59] Unfortunately, the Treaty was never implemented because the regime that signed the treaty was overthrown.

The next regime repudiated the treaty. Instead, the Lausanne Treaty was signed with the new Turkish government providing some protection for "non-Muslim" minorities, which the government denied applicability of to the Kurds.[60] In response, the Kurds revolted. The revolts were brutally suppressed. After the revolts, the Turkish government enforced mass deportations, population transfers, prohibited Kurdish language and names, and applied martial law until the

[57] Ranj Alaaldin, Iraq's Next War, Foreign Affairs (2018), https://www.foreignaffairs.com/articles/middle-east/2018-09-13/iraqs-next-war.
[58] Supra note 55.
[59] Goldman at 68 citing McDowall at 33.
[60] Goldman at 69 citing McDowall at 16-17.

1940s.[61] Once Turkey instituted democratic elections in the 1950s, several restrictions including martial law were lifted. Throughout the 1970s martial law was reinstituted in response to Kurdish resistance movements. "From 1983 until Iraq's invasion of Kuwait in August 1990, Turkey and Iraq cooperated closely to contain their respective Kurdish populations and Kurdish nationalism."[62] Once the Kurdish movement became militant, their repression by the Turkish government increased. The "campaign against the Kurdish identity has resulted in a systematic denial of their ethnicity and the violation of their group rights…The Turkish government has continually denied the existence of the Kurdish identity."[63]

Although Turkey is wary of its own Kurdish population, it has excellent relations with the leadership of the Kurdistan Regional Government. It is its single-most important trading partner.[64] Another indication of positive relations between Turkey and the Iraqi Kurds includes support of Mullah Mustafa Barzani, an Iraqi Kurdish political leader from the 1940s through 1970s. He "was supported by Turkey and Iran, so long as he did not inspire separatist agitation among their own Kurds."[65] This position is consistent with Turkey's recent attacks on the Syrian Kurds in that it supported US and Coalition efforts to suppress ISIS with local forces, but did not support potential threats from Syrian Defense Forces encroaching on Turkey's border. Thus, Turkey's policy on the Kurds outside of its borders is it will support the weakening of neighboring governments to its advantage through the resistance of the Kurds, so long as the separatist movement does not inspire separatism within Turkey.

**Syria**

[61] Goldman at 70 citing McDowall at 39.
[62] Goldman at 72.
[63] Goldman at 72.
[64] Henri Barkey, *Long-marginalised Kurds are now key to a Middle East solution*. The Financial Times, 13 (2016).
[65] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination*, at 190 (1996).

Most of the Kurds in Syria came there to flee Turkish repression of the 1920s. Oppression of the Kurds in Syria started with the formation of the United Arab Republic in 1958 and an increased focus on Arab culture. When the United Arab Republic fell, the new regime revoked citizenship from over 100,000 Kurds and pursued aggressive resettlement of the Kurds in pursuit of the "Arab Belt" plan, which was later abandoned in 1976.[66] Beginning in 1973, "Syria cooperated to some degree with the Kurdish movement in Iraq, maintained a mildly positive stance toward Turkish Kurds, and after 1979 was hostile to Iranian Kurds."[67] Then, in 1980 the Kurdish Worker's Party (PKK) formed as a political and military movement against Turkey. It was supported by the Syrian government, who wished to keep Turkey destabilized.[68]

During the civil war in Syria, President Bashar Al-Assad's regime has granted citizenship to many stateless Kurds and has allowed de facto Kurdish autonomy in Rojava in Northern Syria.[69] Kurds from both Turkey and Iraq have cooperated in efforts to assist Syrian Kurds battle against ISIS. However, coordination between the states of Turkey and Iraq stop at defeating ISIS and do not extend to Kurdish self-determination, autonomy, or independence. So too does President Al-Assad's good will towards Syrian Kurds. It is likely he will try to regain control over Rojava when the civil war ends in order to rebuild the country as a whole. Thus, Syria will be more focused on rebuilding, than on meddling on the issue of independence of Iraqi Kurds.

**Regional Impact**

Movements for Kurdish independence in each country are both historical and ongoing. Even though the struggle for self-determination by Iraqi Kurds has been territorially confined,

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[66] Goldman at 84 citing Kurdistan: Information on the Area and People of Kurdistan, Extracts from KURDISTAN TIMES (1992).
[67] *Id.*
[68] Michael J. Kelly, *The Kurdish Regional Constitutional 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, 724 (2010)
[69] Zeynep Kaya & Matthew Whiting, *Sowing Division: Kurds in the Syrian War*, XXIV Middle East Policy Council (2017), https://www.mepc.org/journal/sowing-division-kurds-syrian-war.

limited in scope, and mainly defensive, countries bordering Iraq are consistently concerned that supporting an independent Iraqi Kurdistan will create similar demands from the Kurdish populations in their own country. In reality, the struggle for Kurdish autonomy already exists in neighboring countries. It is most pronounced in Syria and Turkey. Partially due to the loyalty of Turkish, Syrian, and Iraqi Kurds between each other as ethnic kin and partially due to the chaos created by ISIS, the borders between Turkey, Syria, and northern Iraq are particularly appealing to those wishing to exploit gaps in security and exploit local sympathies to further a resistance against states for autonomy. For example, part of Turkey's objection to the SDF is they consider the SDF as affiliated with militant Kurds in Turkey.

Isolating the Iraqi Kurdish struggle from the struggle of Kurds in surrounding areas is difficult. At play are land, natural resources, security, economic potential, and a large population as benefits to a state. These benefits must be balanced against the will of the people inhabiting those areas to govern themselves. Clearly, there are significant incentives for the state to remain in control. The regional and global dynamics necessitate that international actors will be involved. For example, even though bordering countries fear the exercise of self-determination within their own borders, they will support Iraqi Kurdish independence if it supports their own national interests of weakening or de-stabilizing other countries in the area. In 2010, Kelly claimed "Neither Turkey, Syria nor Iran wish to see an independent Kurdish state emerge from the chaos in Iraq. Consequently, those states will likely seek to keep the Kurdish political factions as disunited as possible for the foreseeable future."[70] Not only do Turkey, Syria and Iran not wish to see an independent Iraqi Kurdish state, they do not wish to have any independent Kurdish state. In continuing to foster resistance of Kurds in their neighbors and trying to prevent resistance of Kurds at home, states are using the Kurds as pawns to further their own national

[70] Supra note 67.

interests. As a result, the Kurds are continually serving the national interests of another, rather than furthering their own cause. This is one reason why the international community should serve as a guarantor of the peace, because its interests would be in support of principles of law instead of national interest.

However, with Iraq battling both sectarianism and ISIS, the KRG has been a stabilizing actor in the region. They are have proved to be a capable security and defense force, supportive of individual rights and liberties, and economically resourceful. The cracks in Arab culture in Iraq are being filled by a strong Kurdish people. An independent Iraqi Kurdistan could balance (or at least provide an alternative to) the growing power of Iran in one direction and terrorism in the other direction.

One major problem with a Sons of Soil movement for all Kurds is that their soil overlaps porous borders of Iran, Iraq, Turkey and Syria, states that have had issues establishing cooperation for cross-border regional stability. Without this cooperation between the states, the ability of the Kurdish people to negotiate a larger Kurdistan is limited. Getting an agreement on their claim to the soil needs to involve all of these states. Further, this lack of cooperation lends itself to Kurdish resistance element's ability to conduct guerrilla warfare, because they have safe havens in one or more of the bordering states depending on the level of coordination between these neighboring governments at the time. Finally, these nations derive a significant portion of their GDP from the oil that resides in the soil the Kurds are fighting for, which none of these governments are willing to sacrifice.

Being sensitive to the concerns of its neighbors over a power grab by the KRG, the KRG has made no move towards collaborating with Turkish and Syrian Kurds for a greater Kurdistan. In fact, as discussed earlier, it is unrealistic that the Kurds from disparate states would unite.

Reasons of geography, history, and competition, prevent this. Thus, Iraq's neighbors should be less concerned with threats to territorial integrity from a united Kurdistan and more concerned with resolving relations between the government and the people within their own states.

Another benefit to the region of a strong KRG is increasing trade between states by having a stable area in which trade can flourish. Already, Turkey is reaping the benefits of KRG produced oil, trade, and consumer market. KRG has already taken in over a million refugees and/or internally displaced persons.[71] Independence would allow KRG to better address the humanitarian crisis by acting locally and internationally without restraint from Baghdad.

**Precedents**

Since inclusion of the right to self-determination in the UN Charter in 1945, "there have been only nine cases of full partition after a secessionist war that resulted in a fully independent, internationally recognized and sovereign state… and there have been only eight cases of de facto partition, where the two entities are basically separated and autonomous, but the seceding entity has not achieved sovereign independence.[72] In comparison, there are currently over 40 active armed conflicts globally.[73] Exercising the right of national self-determination or secession is often an international problem. The national government, regional actors, and international community are important players to successfully use this right. For the Kurds, "factors, such as strategic security, historical experience, superpower pressures, and the natural resources within Kurdistan, contribute to the desire of each central government to encourage Kurdish separatism in its neighbors while repressing it at home."[74] Given the aforementioned relations between

[71] Abdul Rahman, B. S. (2018, November 30). *Kurdistan and Iraq after ISIS: What's next?* Lecture presented at Center for Strategic Studies Fletcher School Tufts University, in Medford, MA.
[72] Toft at 593 adapting Thomas Chapman and Philip G. Roeder, ''Partition as a Solution to Wars of Nationalism: The Importance of Institutions,'' American Political Science Review 101 (2007): 677–692. Sovereign states: Ethiopia-Eritrea, India-Pakistan, Indonesia-EastTimor, Israel-Palestine, Pakistan Bangladesh, South Africa-Namibia, Sudan-South Sudan, Yugoslavia-Bosnia, Yugoslavia-Croatia; States with de facto partition include: Azerbaijan-Karabakh, Cyprus-Northern Cyprus, Georgia-Abkhazia, Georgia-South Ossetia, Iraq-Kurdistan, Moldova-Transnistria, Russia-Chechnya, and Yugoslavia-Kosovo.
[73] Forgotten Conflicts, The New Humanitarian (2017), https://www.thenewhumanitarian.org/in-depth/forgotten-conflicts

Kurdish populations and the respective states in which they live and the limited examples of successful self-determination, obstacles to forming a united Kurdish state spanning the entire area of their claimed territory are significant. However, it may be possible to have an independent Iraqi Kurdistan. As the central government of Iraq continues to be mired in ethno-religious conflict, in contrast the Kurdish Regional Government has proven itself a capable, stable, and profitable entity. "24 foreign government consulates started operating out of Erbil in parallel with their embassies in Baghdad. In addition to the consulates, several other countries have commercial offices and honorary consuls, while a number of international entities like the European Union and the United Nations have missions."[75] Conditions in Iraq and US policies, which will be discussed in the following sections, make the exercise of self-determination in the form of increased autonomy within a federal Iraq the most likely course of action.

**IV. State of Iraq**

The representation system in Iraq has left the government ineffective, riddled with corruption, and failing to meet the basic needs of its citizens. The idea behind "*muhasasa taifa,* a system of sectarian apportionment that has informally structured government formation since 2005" was to "give representatives of the different communities in Iraq—Sunni, Shiite, and Kurd—a stake in government and hence a commitment to peace."[76] Instead, the system rewards the granting of cabinet positions and similar acts that bypass parliament by rewarding sectarian and ethnic patronage. Thus, Iraq's ruling elites have failed to address the conditions that enabled ISIS in the first place.[77]

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[74] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination*, at 200 (1996).
[75] Zadeh at 591.
[76] Toby Dodge, Is There Hope for Reform in Post-Election Iraq? Foreign Affairs (2018), https://www.foreignaffairs.com/articles/iraq/2018-10-17/there-hope-reform-post-election-iraq.
[77] Supra note 57.

Fearon makes the following prediction for Iraq, south of the Kurdish areas, "Effective political authority will devolve to regions, cities, even neighborhoods. After a period of ethnic cleansing and fighting to draw lines, an equilibrium with lower-level, more intermittent sectarian violence will set in, punctuated by larger campaigns financed and aided by foreign powers. Violence and exploitation within sects will most likely worsen" as those who carried out the ethnic cleansing "fight amongst themselves over turf, protection rackets, and trade."[78] This prediction is already playing out. Foreign powers, such as Iran, are providing support and direction to Shiite militias to gain influence in the region. Currently, "Shiite militias are more powerful than the Iraqi armed forces… Shiite militias do not submit to government control, but they are entrenched within state institutions and exploit state resources."[79] This further aggravates the conditions that enabled ISIS because "Iraq has all the makings of a country that is susceptible to conflict relapse…it could find itself in another civil war," rather than being the harbinger of democracy in the Middle East as the US may have hoped.[80]

**V. US relations with Iraqi Kurds**

The United States relationship with Iraqi Kurds and their neighbors is complicated. During the Cold War, the United States was interested in counter-balancing Russian influence, securing oil supplies, and spreading democracy. In the 50s and 60s the United States position on the Kurdish issue was that it was an "Iraqi domestic matter that needed to be resolved without any foreign interference."[81] Shortly after the Ba'ath regime came to power in 1968, the United

[78] James D. Fearon, *Iraq's Civil War*, 86 Foreign Aff. 2, 7-8 (2007)
[79] Supra note 76.
[80] *Id*.

States supported Kurdish dissention in Iraq in an attempt to weaken the Iraqi government.[82] During the "Arabization" of the Kurdish Region in the 1970s, where the Iraqi government forcibly relocated approximately 250,000 Kurds, the United States remained detached. Again, during the 1988 Anfal campaign, in which the Iraqi government used chemical weapons in its persecution of Kurdish civilians, the United States did not intervene.

It was not until Iraq invaded Kuwait in 1991 that the United States encouraged the Kurds to revolt in northern Iraq. The Kurdish uprising was so successful that they controlled nearly every city in the north within days. Seeing this, the Bush Administration began to fear the disintegration of Iraq, and therefore distanced itself from the Kurdish rebels. By abandoning the Kurds at this critical time, the uprising quickly ended and the Iraqi government punished the Kurds.[83]

The persecution of Iraqi citizens by the government created a mass refugee problem and political instability in neighboring states. Here, the UN acted, passing a resolution to provide humanitarian relief, criticizing Iraq for treatment of its citizens in "creating a threat to international peace and security," and establishing the precedent for international intervention when a state's repression of its citizens causes mass refugee problems and political instability.[84] Additionally, the United States passed legislation creating a safe haven for the Kurds north of the 36th parallel. In United Nations Resolution 688 a no-fly zone was established in support of Iraqi Kurds in Northern Iraq. The US strategy to overthrow Saddam in conjunction with the safe haven for the Kurds led to both "overt relations between the United States and the Iraqi Kurds" and the formation of the Kurdish autonomous region.[85] Later, in 1998, the United States served as

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[81] David Romano, Rikar Hussein & Stephen Rowe, *The United States and the Kurds of Iraq: Strange Allies*, *in* Between State and Non-State: Politics and Society in Kurdistan-Iraq and Palestine 177–195, 179 (2017).
[82] Goldman at 77.
[83] Goldman at 79 citing ERIC GOLDSTEIN, ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH 30 (Andrew Whitley ed., Helsinki Watch 1992).
[84] Goldman at 80 citing Resolution concerning the Iraqi Civilian Population, U.N. S.C. Res. 688, 30 I.L.M. 858 (1991).

a broker of the peace to end the civil war between the Kurdish Democratic Party (KDP) and the rival Patriotic Union of Kurdistan (PUK) party incurring continued responsibility for protection against the Saddam regime.[86]

In the Second Gulf War, the Kurds stood out as "the most capable and united indigenous Iraqi political group in helping to overthrow Saddam's regime. In addition to military coordination and intelligence sharing, ties were extended to civic relationships in the fields of diplomacy, economics, education, culture, and other areas."[87] More recently, in the fight against the terrorist organization of Islamic State in Iraq and Syria (ISIS) the United States partnered with both Iraqis and Kurds in pursuit of its national interests. "The leaders of powerful states — including the US, the UK, France, Germany, Italy, Canada, and Australia, among others — now consider the KRG as one of their key allies in security enforcement in a region largely seen as hostile to the West."[88]

The US National Defense Strategy (NDS), the Defense Department's guiding document implementing the National Security Strategy (NSS), reinforces the importance of strong allies and partners as well as "maintaining favorable regional balances of power" in the Middle East.[89] The most recent NDS shifts from the more unilateral approach of the Bush Administration in the early twenty-first century to a multilateral approach. Here, emphasis is placed on relationships with partners and allies, as well as seeking a "resource-sustainable approach" to "consolidate gains in Iraq and Afghanistan."[90] It acknowledges that "allies and partners also provide access to critical regions, supporting a widespread basing and logistics system that underpins the

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[85] H.R. Con. Res. 299, 102nd Cong., 2d Sess. (1992). ; Romano at 182, 185; United Nations Resolution 688. 1991.
[86] Romano at 182-183.
[87] Romano at 183-184.
[88] Zadeh at 601.
[89] Summary of the 2018 National Defense strategy of the United States of America: sharpening the American military's competitive edge p. 4. (NDS)
[90] NDS at 4.

Department's global reach."[91] Given this rhetoric coupled with the proven reliability of the Iraqi Kurds, there is potential for deepening the partnership between the US and the Iraqi Kurds.

Unfortunately for the Kurds, despite progress in relations with the KRG, US policy as expressed by the Department of State in the Integrated Country Strategy for Iraq continues to support the government of Iraq (GOI). However, supporting the GOI conflicts with the competing national security interest of defeating ISIS. For example, the United States provides arms to the Iraqi central government for allocation instead of providing them directly to the Peshmerga, the Kurdish fighting force. Secretary Carter argued arming the KRG and "bypassing Baghdad 'could be viewed by the government of Iraq as directly interfering in Iraq's internal affairs,' and that such a policy 'fuels false narratives in Iraq and elsewhere in the region that the United States intends to partition the country.'"[92] This argument is weak in that it does not take into account that Coalition partners do directly arm the Peshmerga without fueling narratives of supporting partition. By not directly arming the Kurds, the US facilitates the GOI in allocating arms not according to military need or effectiveness, but according to partisanship and sectarianism. In maintaining support to GOI it "serves to strengthen Baghdad at the negotiating table and to hinder the Peshmerga's ability to combat ISIS, thereby prolonging the crisis in the northern areas of Iraq."[93] It is time for the US to re-evaluate its policies in Iraq.

Although US relations with the Iraqi-Kurds continues to deepen, and Iraq verges on a sectarian civil war, the US persists in advocating Iraq remain a "unified country."[94] In the Strategic Framework Agreement between the United States and Iraq signed in 2008, both countries agree to "the principle of noninterference in internal affairs and rejection of the use of

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[91] NDS at 8.
[92] Romano at 188 citing Austin Wright et al., Iraqi ambassador: Ernst's military aid proposal a 'dangerous precedent' POLITICO (2015), https://www.politico.com/story/2015/06/joni-ernst-military-aid-kurds-isil-fight-iraq-ambassador-react-118922.
[93] Romano at 189.
[94] Integrated Country Strategy Iraq, Department of State, p. 4, August 13, 2018.

violence to settle disputes."[95] The Department of State's Integrated Country Strategy for Iraq recognizes that "identity-based targeting of livelihood and reconstruction assistance (such as to ethnic or religious minorities) could undermine social cohesion in areas or returns and possibly create resentment in other areas of Iraq."[96] If allocation of arms to the Kurds is any indication of how assistance will be dispatched, then social cohesion will indeed be undermined. Yet the US continues to adhere to a policy where:

> Mission Iraq will facilitate dialogue among the different political movements in the Iraqi Kurdistan Region (IKR) to encourage creation of a strong Kurdistan Regional Government (KRG) *anchored within a federal Iraq.* This will require that the KRG take part actively and productively in Iraq's national political process, and that both sides address seriously the other's legal and constitutional concerns[97]

Thus far, the US has neglected parity in addressing legal and constitutional concerns of the Kurds.

The US twice had the opportunity to support the Kurds in undertaking a referendum for independence in 2014 and in 2017. Nine years after voluntarily joining the Republic of Iraq and seven years after the Iraqi constitutional deadline for a referendum on disputed territories had passed, the Kurdish Regional Government sought to hold a referendum. It would have satisfied Kurdish legal concerns regarding their territory and fulfilled the constitutional obligation under Article 140 of the Iraqi Constitution.[98] In 2014, the US urged the KRG to postpone the referendum, due to the ISIS insurgency, which they did. In 2017, after making significant progress against ISIS and liberating Mosul, the KRG re-engaged Baghdad. When Baghdad refused to have the referendum, the KRG held a referendum on independence unilaterally over objections by Baghdad, the US, Turkey, and Iran. In response to the KRG's unilateral action,

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[95] Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, U.S.-Iraq, November 17, 2008.
[96] Supra note 94 at 8.
[97] Supra note 93 at 2.
[98] See Article 140, Section 2, The Constitution of the Republic of Iraq of 2005.

Baghdad implemented both security and economic measures to exert control over the Kurdish Autonomous Region. Again, the US did not intervene on behalf of their Kurdish partners. Thus far, "US policy towards the Kurds has always rejected Kurdish independence."[99] Even when other states have adapted their Kurdish policies considerably, long-standing policies in Washington of not encouraging secessionist movements hold.[100]

Now, as the fight against ISIS continues in Syria, the US relationship with the greater Kurdish community continues to be strained by mixed messages. The National Defense Strategy dedicates an entire line of effort to "strengthening alliances as we attract new partners."[101] On the one hand, the Kurds have proven to be reliable and capable military partners in the defeat of ISIS. In fact, almost all the territory ISIS has lost in Iraq and Syria has been due to Kurdish militias working in tandem with the US air force.[102] For this reason, the US needs to cultivate this relationship. For the Iraqi Kurds it is significant that in October 2014, the international community, including Turkey, agreed for a sub state government like the KRG to send troops to another country (Syria) to fight ISIS.[103] Allowing KRG troops to fight in Syria demonstrates US commitment towards their Kurdish partner. On the other hand, when Turkey, fearful of a Kurdish uprising at its border, launched attacks against primarily Kurdish Syrian Defense Forces in Afrin, the United States did not come to their aid. Instead, the US is attempting to balance its NATO obligations with Turkey against its need to "attract new partners" and "develop enduring coalitions in the Middle East." [104] Yet, when the US declared it would begin withdrawing US troops from Syria, it warned Turkey against any further attacks on US backed Syrian Kurds.[105]

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[99] Romano at 177.
[100] Romano at 190-191.
[101] NDS at 5.
[102] Henri Barkey, *Long-marginalised Kurds are now key to a Middle East solution*. The Financial Times, 13 (2016).
[103] Zadeh at 600 (2017).
[104] NDS at 5, 9.

The US even emphasized the importance of their relationship with their Kurdish partners in Syria. US policy towards the Iraqi Kurds is influenced by US national interests, commitments to international treaties like NATO, regional politics, and the internal affairs of Iraq. The seemingly erratic relations with the Iraqi Kurds evidences that the US turns to the Kurds "only when its relations with [the] Iraqi central government have deteriorated."[106]

## VI. Should US support self-determination of the Kurds?

### Arguments against US support of Kurdish self-determination

#### Self-determination does not end ethnic tension

In response to Kaplan's argument in favor of partition, Etzioni in his article, *The Evils of Self-Determination,* makes a compelling argument against self-determination. He observes, "If tolerance between groups is not fostered, the resulting breakups will not lead to the formation of new stable democracies, but rather to further schisms and more ethnic strife, with few gains and many losses for proponents of self-government."[107] If the Kurds establish their own state, it will neither solve the underlying problem of relations between Iraqis and Kurds, nor the problem of relations between varying factions of the Kurds themselves. This may be true, but a stable Kurdistan is better than an instable Iraq as a reliable partner for the US. Etzioni further argues "ethnically based breakaway states generally result in more ethnic homogeneity and less pluralism, meaning that they often lack the deeper sociological foundations of democracy."[108]

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[105] John Hudson & Kareem Fahim, TRUMP VOWS TO 'DEVASTATE' TURKISH ECONOMY IF U.S.-BACKED KURDS ARE ATTACKED, THE WASHINGTON POST (2019), https://www.washingtonpost.com/world/national-security/trumps-vow-to-devastate-turkey-rattles-negotiations-over-syria-withdrawal/2019/01/14/1a61049c-17ff-11e9-88fe-f9f77a3bcb6c_story.html?noredirect=on&utm_term=.9c65a0e2b79a.
[106] Romano at 178.
[107] Etzioni, A. (1993). The evils of self-determination. Foreign Policy, 89, 21.
[108] Etzioni at 33.

However, the KRG has demonstrated itself to be tolerant of other groups, specifically that of IDPs, and more progressive when compared against the rest of Iraq on human rights.

Although the Kurds have historically been discriminated against within Iraq, they have gained significant autonomy, freedom, and participation not previously experienced. In fact, the new constitution has only been in effect since 2005. This constitution grants broad authorities to regions, provinces, and local administrations.[109] It also guarantees numerous rights to both individuals and groups, like the Kurds. Thus, their improved circumstances should be combined with allowing time for the constitutional improvements to work to greater benefit the Kurds. "The principle of pluralism within unity provides a guideline for consideration."[110] The problem with this argument is that the way in which the government in Baghdad is functioning (or not functioning) demonstrates an inability or unwillingness on the part of Baghdad to adhere to its constitutional commitments. Worse, it possibly indicates still active discrimination against the Kurds. Rather than waiting for the next internal conflict to arise, the US should stand with the Kurds to enforce the provisions of the Iraqi Constitution, including the possibility of secession from the federal system of Iraq.

**Kurds as a counterbalance in Iraq**

Kurds remain a vital part of Iraq. First, their geographic location along the northern border provides a buffer against neighboring states, who are trying to exert influence by encouraging sectarian violence. Next, Kurdish territorial lands are rich in natural resources. These can help pay to rebuild the Iraqi state, which has been devastated by years of war. Additionally, the Kurds can serve as a balancing force within Iraq between the Sunni and Shia Muslims by having greater representation in the government. Lastly, not only does Kurdish

[109] Constitution of Iraq.
[110] Etzioni at 35.

secession not resolve the problem of disputed territories within Iraq, it does not solve the divide between Iraqi Kurds themselves. The voting outcomes of the independence referendum along PUK and KDP lines, subsequent cooperation of the PUK with Baghdad against KDP direction, and continued disputes between KRG and PUK are indications that an independent KRG may not be as stable as hoped. Instead, secession would remove the power sharing structure now in place between the PUK and the KRG, which may lead to another Kurdish civil war. Worse yet, if the KRG is allowed to secede, so too may other wealthy areas of Iraq wish to secede, which leaves resource deprived areas to either be unsustainable or fight to prevent the secessions. If the United States is concerned about the stability of Iraq and surrounding areas, it should help Baghdad and the Kurds to work within the Iraqi federal system to strengthen national ties.

**Iraqi Kurdistan borders are unrealistic**

Although the KRG is advocating only for independence from Iraq in a geographically limited area and within defined international borders, the ability to separate is a slippery slope. As Iraq's neighbors fear, if the Iraqi Kurds gain independence, it is possible that the Syrian and Turkish Kurds will also either fight for their own independence or even join with the KRG. This would create a formidable Kurdish state as a new competitor within the region, which could create more unwanted instability at a time where the United States National Defense Strategy identifies "inter-state strategic competition, not terrorism" as the primary concern in U.S. national security.[111]

**Loyalty to partners**

The US has consistently been working towards a unified Iraq. It has invested decades, thousands of lives, and trillions of dollars towards the war on terror. One objective of the war on terror is to help Iraq's government become strong enough to defeat terrorism. It may seem

[111] NDS at 1.

disloyal to abandon a unified Iraq in favor of supporting the Kurds. This would be misleading. The US would remain dedicated to helping Baghdad unify, strengthen, and rebuild. However, supporting the Kurds is not mutually exclusive of supporting Baghdad. If the Kurds pursue a path from within the parameters of the Iraqi constitution, then supporting them is consistent in supporting a solution to the governance of Iraq, by Iraqis.

**Arguments for US in support of self-determination of the Kurds**

**Why should the US be involved at all?**

At the end of World War I the British extricated themselves from the middle east, thereafter the United States filled the void as a super power, ally, and counter-balance to opposing interests in the region. Because the middle east is rich in natural resources, possesses strategic sea lanes, and hosts nuclear powers, the United States views this area as vital to its national interest. Accordingly, the United States will continue to be entangled in the region indefinitely. Given this fact, the United States should support governments and policies favorable to the United States in the long term.

**A unified Iraq is unlikely**

Over the last couple of decades, the US efforts in Iraq have not achieved a viable Iraqi state that balances the interests of Sunni, Shiite, and Kurd. From the ouster of the Saddam regime to the fight against ISIS, Iraq remains a nation divided. Even within these groups there is a lack of cohesion, as demonstrated by the divide of KDP and PUK or between Shiite militias. Once the Saddam regime was removed, a power vacuum developed. Differing groups were vying to fill it. US efforts in establishing a transition government with a power-sharing agreement between sects, though well intentioned, lacked legitimacy. In reality, the US government used "unconditional military support for the Shiite-dominated government that it helped bring to

power in Baghdad."[112] This created a power imbalance between parties. It interfered with the resolution of the dispute, rather than solving the dispute. Because "most civil wars end with a decisive military victory," the fighting in Iraq will likely continue until this happens.[113] Another political dictatorship is not in US interests. Rather than attempting to prematurely force a unified Iraq, alternatives should be explored.

One alternative is partition. Kuperman asserts, "ethnic (in contrast to ideological) civil wars [are]virtually impossible to solve through power-sharing settlements and can be resolved only [by] physical separation of the opposing ethnic groups into politically autonomous, ethnically homogenous zones.[114] Dividing Iraq into Sunni, Shiite, and Kurdish regions is tempting. Partition is not plausible for the Sunnis and Shias based on the mixed distribution of the population and the deficit of oil in the primarily Sunni West. Partition may be plausible for the Kurds. They are geographically concentrated, have demonstrated the ability to advocate for themselves with a single voice, and possess enough oil in their own region sufficient not to be dependent on the rest of Iraq.

Partition for the Kurds could occur by fighting or through constitutional secession. This would leave the remainder of Iraq with the Shiite and Sunni fighting for power. Until an agreement can be reached or a decisive military victory achieved for these parties, it would in effect be status quo. Eppel believes the Kurds are the key to a stable Middle East. He claims, "A political solution for Kurdish national aspirations—a fully independent Kurdish state or Kurdish regions that enjoy wide autonomy in the framework of existing states—is necessary for the stabilization, peace, and successful development of the Middle East."[115] Rather than choosing

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[112] Fearon at 13.
[113] Fearon at 14.
[114] Kuperman, A. (2004). Is Partition Really the Only Hope? Reconciling Contradictory Findings About Ethnic Civil Wars. Security Studies, 13(4), 314-349 Citing Kaufmann, C. (1996). Possible and impossible solutions to ethnic civil wars. *International Security, 20*, 136-175.

sides between Sunni and Shiite, the US could serve as a facilitator of peace for them while choosing to focus efforts on firming up the KRG as its own island of peace in the ocean of violence that is Iraq.

**Conflicting Ideals of International Law**

Earlier the tension between territorial integrity and self-determination was discussed. Balancing these ideals is difficult. For the US, it has a national interest in maintaining territorial integrity of other states so that its own territorial integrity will be protected. Similarly, the US would support nonintervention, in that other states should not interject themselves in strictly internal affairs of the US. At the same time, in harmony with its founding principles, the US also has an interest in supporting individual and group rights. Self-determination, as incorporated as part of international law, "should be concerned primarily with people, not territory."[116] If a state should support self-determination only to protect individual and group identity and facilitate effective participation in government, then the US should support the Kurds in their pursuit of self-determination.[117] If for the abovementioned reasons the US wants to maintain territorial integrity over the right of self-determination, then it could still support Kurdish independence in the form of constitutional secession without betraying those ideals. Here, the US and the international community, in order to decide the legitimacy of a given secession, must refer to Iraqi domestic law.[118]

In the case of Iraq, supporting the Kurds achieves US interests. First, the borders between KRG and neighboring states and between the KRG and the rest of Iraq will essentially be unchanged. Hannum rightly observes, the "interest in internal constitutional arrangements raises

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[115] Michael Eppel, The Foreign Policy Essay: The Kurdish Right to Self-Governance, Lawfare (2015), https://www.lawfareblog.com/foreign-policy-essay-kurdish-right-self-governance.
[116] Hurst Hannum, *The Specter of Secession: Responding to Claims for Ethnic Self-Determination*, 77 Foreign Affairs at 15 (1998).
[117] *Id* at14.
[118] Mancini at 499.

difficult questions about which issues fall within a state's domestic jurisdiction and which are the legitimate concern of the international community."[119] As discussed earlier, disputes on self-determination are inherently of an international character, rather than strictly internal affairs. What would be gained for the US and the Kurds by supporting self-determination is significant. First, under international law, it would be a victory in favor of group rights. The idea of self-determination may have originated in response to the colonial period, but its applications are and should be greater. Having an independent Iraqi Kurdistan would allow the Kurds to protect not only their culture, language, and territory, but also enable it to grow. Second, it would reverse the history of lost autonomy by the Kurds. From the Treaty of Sevres to punishments of Baghdad after the most recent independence referendum, the Kurds have suffered a cycle of lost autonomy at the hands of non-Kurdish actors. Third, it would overcome historical grievances between the Kurds and the Iraqis. This is a powerful motivator in support of self-determination. Originally, "self-determination movements gained support because they fought against oppression, not because they fought for separatism."[120] Here, the Kurds are fighting against oppression by Baghdad. Supporting the Kurdish in their pursuit of self-determination aligns with both US national security interests and democratic ideals.

Having a democratic stable government in the Middle East has multiple advantages to the US. This government could serve as a stabilizing factor in a tumultuous region. Militarily, it could serve as a partner for training troops, security in the region, a basing area and more. Economically, it could expand a market for oil and goods. Politically, it could serve as a moderate voice for the advancement of human rights, women's rights, and democratic ideals.

**Capable partner and ally**

[119] Supra note 112.
[120] Etzioni at 35.

One mantra of United States special operations community is "you can't surge trust." By this, they mean that it takes time, commitment, understanding and familiarity to build a relationship between partner forces. The special operations community has been building this relationship with both the GOI counter terrorism service (CTS) and the peshmerga of the KRG for almost two decades. "From the 2003 Iraq war until the withdrawal of US military forces in late 2011, not a single US soldier was killed in the Kurdistan Region."[121] This is attributable not only to the strong partnership between the two forces, but also to the hard-fought stability brought by KRG in the North. The fight against ISIS demonstrated the effectiveness of the partnership between the US and the Kurds. These two groups made the most progress on the battlefield when compared to other Iraqi armed forces. This relationship should be cultivated.

Often, there is a tension between what US military forces experience in their partnerships and what the civil political institutions dictate its actions to be. For example, after spending years training and fighting in Iraq, gaining experience with Iraqi armed forces, CTS, and peshmerga, troops have tactical and operational experiences vastly different than the strategic (or lack of strategic) direction being directed by Washington. At this lower level the corruption, infighting, and tensions between elites, tribes, and religious sects is palpable. It affects daily operations from something as simple as traffic patterns to access to food vendors to safety and security of missions. In contrast, the Kurds have provided a unified front from which to fight. Meanwhile, civil political institutions in Washington with each electoral cycle are slowly eroding the trust built between these partner forces by continuing to support a unified Iraq in spite of the differing experiences of the troops with GOI and KRG on the ground.

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[121] Romano at 184.

Even though there are internal conflicts between the KDP and the PUK, they appear to overcome these for the greater security of protecting their homeland. Because the Kurds are fighting a "sons of soil" movement, the territory has particular significance for them. The Kurds have been steadfast partners to the United States in a country fraught with internal conflict. Whether it was providing basing, partnering on operations, receipt of training, working democratic processes, protection of refugees and internally displaced persons or other functions of government, the Kurds consistently act in accordance with international principles the United States supports. The United States should reward the positive progressive behavior of the Kurds, foster its relationship with them, and provide support necessary for them to achieve their goals of self-determination. Doing so is consistent with the current NDS, in that it would build upon the foundational relationship, trust, and support to this underrecognized partner and ally. Supporting the Kurdish right to self-determination does not have to conflict with supporting the GOI. Kurdish self-determination can take many forms, whether in a federal Iraq, an autonomous region of Iraq, or through constitutional secession in Iraq. US involvement with the GOI stems from the abuses of a regime that no longer exists. It is time for the US to turn to what does exist, the utility of Kurdish self-determination.

**Lasting Peace**

Thus far, the United States has served as a "guarantor of the peace" for the Kurds. This occurs in the face of a security dilemma. Toft explains a security dilemma "holds that members of ethnic groups fear one another, there is a deep-seated mistrust between ethnic groups, and therefore, in the absence of effective state authority and especially after violence between groups, the various groups need to be separated into their own compact territories."[122] The United States and its allies created the safe haven in northern Iraq, which allowed the Kurds to isolate

[122] Toft at 593.

themselves from the threats and instability facing the rest of Iraq. By separating the Kurds into their own compact territory distinct from the rest of Iraq, they have been able to thrive. The United States should continue to support their success.

In Syria, the US has pursued a balancing act between supporting Syrian Defense Forces, who are primarily Kurdish, and maintaining Turkey as an ally, who categorizes these forces as a terrorist group. The US let down the Syrian Kurds in Afrin by not coming to their defense in an attack by Turkey. However, some time thereafter, the Syrian Kurds received political support from the US when the president vowed to "devastate" the Turkish economy if US backed Kurds were attacked.[123] Although the Kurds anticipated an attack from Turkey, for just as long, they have anticipated that their allies will desert them once the immediate threat of the Islamic State subsided.[124] The relationship between the US and Syrian Kurds affects its relationship with Iraqi Kurds. Because "external states do seem to support groups seeking autonomy, ethnic kin do so even more. Upwards of 75 percent of groups seeking self-determination in 2006 received support from kin."[125] The Iraqi Kurds identify with the struggles of their ethnic kin in Syria, even fighting with them to defeat ISIS in Syria. How the US treats its partners and allies, like the Syrian Kurds, will factor into whether the Iraqi Kurds will trust the US in its own struggle. This relationship between the Iraqi and Syrian Kurds is exactly the type of relationship its neighbors fear will alter the current borders. The US can serve as a trusted partner to prevent that fear from becoming a reality by supporting Iraqi Kurds.

To foster stability within Iraq, the US cannot desert the Iraqi Kurds. Currently, the Iraqi Kurds are working within the federal system of Iraq to pursue secession. Usually, federalism

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[123] Supra note 105.
[124] J. Dana Stuster, Turkey Invades Syria to Fight U.S.-backed Kurdish Forces ... Again Lawfare(2018), https://www.lawfareblog.com/turkey-invades-syria-fight-us-backed-kurdish-forces-again.
[125] Toft at 591 citing Monica Duffy Toft and Stephen M. Saideman, ''Self-Determination Movements and their Outcomes,'' in J. Joseph Hewitt, Jonathan Wilkenfeld, and Ted Robert Gurr, eds., Peace and Conflict 2010 (Washington DC: Paradigm Publishers, 2009), 39–50.

provides a fundamental structural solution to two of the most common sources of friction among groups and between groups and central governments representing the state.[126] But, the Kurds continue to be insecure or anxious about protecting their identity, language, or cultural heritage. Based on the withholding of designated funds from the federal budget to the Kurds, they have cause to be concerned about the state's distribution of resources, which undermines the utility of federalism. As Toft notes these concerns can lead to a progression of self-determination over time starting:

> from minimal claims of cultural and educational protection and autonomy, to control over regional government and financial policy, to maximal claims of outright independence and statehood. Often the demands begin with lobbying to implement policies that protect elements of a group's identity that the group perceives to be threatened, extend to demonstrations, further lobbying, and depending on the reaction of the state, perhaps rioting, violence, and war… One of the only studies to examine the timing found that the escalation period from non-violent protest resembling conventional political activity to engagement in violent rebellion took on average about 13 years.[127]

The Kurdish struggle for self-determination is following this pattern. Moreover, because the Kurds are regionally concentrated, they are more likely to mobilize for self-determination and engage in violence than groups who are dispersed through territory or live largely in urbanized areas.[128]The US should acknowledge these risk factors at play and work with the Kurds to prevent violent rebellion.

**Economic viability of KRG**

An independent KRG will not be a burden on the international community. The KRG is rich in both natural resources and educated human capital. The KRG are exercising their economic freedoms under the current Iraqi constitution in the form of oil exploration. How the oil revenue is distributed is a point of contention between Erbil and Baghdad. What can be seen

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[126] Toft at 588.
[127] Toft at 585. See also Ted Robert Gurr, ''Peoples Against States: Ethnopolitical Conflict and the Changing World System,'' International Studies Quarterly 38 (1994): 347–377.
[128] Toft at 590.

in comparison to Baghdad is the economic success of the KRG, even in the midst of providing continued military support to Baghdad and hosting an influx of IDPs. If the KRG are in full control of their land and resources, they would be able to more quickly address the humanitarian needs of the IDPs located there. Addressing the humanitarian needs of IDPs would likely require temporary international assistance, but would not be an enduring requirement.

**Alternate Proposal: Earned Sovereignty**

Earned sovereignty is the concept of utilizing a framework to allow the exercise of self-determination. In this way, it is intended to reduce violence, add predictability, and ultimately resolve the issue of status within the international system. "The original earned sovereignty approach provides for a three-pronged framework to resolving a sovereignty-based conflict: (1) shared sovereignty, (2) institution building, and (3) a determination of final status."[129] This approach is more gradual than a decisive military victory or immediately implementing the results of a referendum. By having a framework to apply to the situation, all parties involved can work through issues, supported by the international community for negotiations or enforcement. This paradigm can resemble what it takes for a country to join the European Union. There could be conditions precedent, benchmarks set, and/or limitations on the new state before it is recognized. In this way, there can be guarantees of human rights, economic viability, and non-violence.

## VII. Conclusion

The United States should not continue to hedge its bets between Erbil and Baghdad. Opening a consulate in Erbil on the one hand, but continuing to coordinate distribution of arms through Baghdad on the other hand, sends mixed messages to both Iraq and the international

[129] Paul R. Williams; Abigail J. Avoryie; Carlie J. Armstrong, *Earned Sovereignty Revisited: Creating a Strategic Framework for Managing Self-Determination Based Conflicts*, 21 ILSA J. Int'l & Comp. L. 425, xii (2015) at 448.

community. In some instances, no decision is a decision. That should not be the case for Iraq. Too much is at stake economically, politically, and for the welfare of the Iraqi population to have the US continue its current position. As the Maliki administration has shown, "a stronger central government will not likely lead to greater cohesion for the Iraqi state."[130] Since the post-Cold War attitude towards secession suggests that international law and the practice of the international community is gradually moving towards the legitimization of the 'secessionist option', albeit only if it is compatible with democracy, and with a pluralistic understanding of citizenship, and if it is gives enough guarantees that it will not undermine geopolitical equilibria,"[131] the US should lead the way in demonstrating how this option can be exercised effectively for the Kurds. Rather than continuing the bleed of weapons, men, and money in forcing a unified Iraq, the US should support its proven partnership with the Kurds.

[130] Romano at 189 citing Romano (2014).
[131] Mancini at 493.

# ANNEX

| Treaty Description | Treaty Name | Signature Date | Ratification Date, Accession(a), Succession(d) Date |
|---|---|---|---|
| Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment | CAT | | 07 Jul 2011 (a) |
| Optional Protocol of the Convention against Torture | CAT-OP | | |
| International Covenant on Civil and Political Rights | CCPR | 18-Feb-69 | 25-Jan-71 |
| Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty | CCPR-OP2-DP | | |
| Convention for the Protection of All Persons from Enforced Disappearance | CED | | 23 Nov 2010 (a) |
| Convention on the Elimination of All Forms of Discrimination against Women | CEDAW | | 13 Aug 1986 (a) |
| International Convention on the Elimination of All Forms of Racial Discrimination | CERD | 18-Feb-69 | 14-Jan-70 |
| International Covenant on Economic, Social and Cultural Rights | CESCR | 18-Feb-69 | 25-Jan-71 |
| International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families | CMW | | |
| Convention on the Rights of the Child | CRC | | 15 Jun 1994 (a) |
| Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict | CRC-OP-AC | | 24 Jun 2008 (a) |
| Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography | CRC-OP-SC | | 24 Jun 2008 (a) |
| Convention on the Rights of Persons with Disabilities | CRPD | | 20 Mar 2013 (a) |

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