

Chapter 5

Why It Is Time for An Independent Kurdistan

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One hundred years ago, in the peace negotiations that followed World War I, the Kurds were promised their own state. Instead of gaining independence, they became divided among Turkey, Iran, Syria and Iraq.¹ The newly established state of Iraq was supposed to be an equal partnership between the Arabs and the Kurds, but this dream soon became a dark reality as all Iraqi governments suppressed the Kurds. Additionally, looking at the Kurdish diaspora around the world today, it is quite clear that Kurds have long lived under oppression and violence under the hands of different regimes.

Kurdistan's case for independence is compelling. Despite the calamity in Iraq, in particular since the United States invasion in 2003, there is hope of peace and stability in the Kurdistan Region. Compared to the rest of the country, violence in the Kurdistan Region has been relatively minor. In many other parts of Iraq, by contrast, different ethnic groups living close to one another are engaged in high levels of sectarian violence. The relative stability in the Kurdistan Region has allowed the Iraqi Kurds to enjoy the country's highest living standard and highest level of foreign investment. Furthermore, the region is stable enough to allow engagement in foreign relations, and to establish a tourism sector, and to host stakeholders from other countries.² The stability that the Iraqi Kurds have created since the fall of Saddam Hussein has presented them with ample opportunity. They have long aimed of having a sovereign state, and have suffered greatly as a result. Most notably, they were victims of a genocide inflicted by Saddam Hussein, which took the live of over 100,000 civilians.³ Given this unfortunate history, their position as the largest ethnic group

¹ Kendal Nezan (President of the Kurdish Institute of Paris), *A brief survey of The History of the Kurds*, the Kurdish Institute of Paris. http://www.institutkurde.org/en/institute/who_are_the_kurds.php, accessed July 24, 2017.

² Denise Natali, *The Kurdistan Region of Iraq: Stabilizer or Spoiler?* Georgetown University Press, 2013, p. 71-79.

³ UNPO and KRG, *The Kurdish Genocide Achieving Justice trough EU Recognition*, p. 4.

in the world without a country has made quite a compelling case for statehood. This in particular as a result of the outcomes of the Arab Spring.⁴

The Arab Spring has brought unexpected and enormous changes to the Middle East with varying impact. While some states made a push for more accountable and democratic political rule, others became immersed in internal or regional conflict and instability. In addition, non-state actors, such as militant and non-militant groups and nationalist organizations, have also been an important component of these transformations. These actors' efforts to seize power both at local and national levels have resulted in violent conflict, civil war, the emergence of new political entities and changes in political rule. The different outcomes of the uprisings in different states are largely related to the pre-existing political structures of the states, regime types, state-society relations and power constellations.⁵ Therefore, this process has raised important political, legal and theoretical questions about not only the internal political structures of the states, their future and regional and international politics, but also other political actors, such as the Kurdistan Regional Government (KRG), and their recognition and international legitimacy. For these reasons, and in particular considering the uncertainty of Iraq's future, the principles of self-determination and sovereignty are highly relevant in discussing the recognition and international legitimacy of the Kurdistan Region.

An Independent Kurdish State under International Law

According to public international law, there are several judicial authorities concerning the right of different peoples to self-determination. These cases have involved countries' Supreme Courts, ad hoc international tribunals, and more importantly, the International Court of Justice.⁶ In several cases, the International Court of Justice has ruled clearly and unconditionally in favor of peoples arguing for their rights to self-determination. It has clearly articulated that the right of self-determination is a legal and an inherent right. It is absolute and cannot be derogated from.⁷

⁴ Larry Diamond and Marc F. Plattner, *Democratization and Authoritarianism in the Arab World*, Johns Hopkins University Press and the National Endowment for Democracy, 2014.

⁵ Mark L. Haas and David W. Lesch, *The Arab Spring: Change and Resistance in the Middle East*, Westview Press, 2012, Part I Spring in the Arab World.

⁶ Gentian Zyberi, *Self-Determination through the Lens of the International Court of Justice*, Netherlands International Law Review, 2009.

⁷ *Ibid*, Chapter 3.

The principle of self-determination is that distinct groups of people have the legal right to determine for themselves to which state they wish to belong. Self-determination is firmly grounded in international law, and both the UN Charter⁸ and resolutions of the UN General Assembly incorporate this principle.⁹ In order for a group of people to attain the right to determine their political destiny, i.e., to choose which state they belong to, the group must be *distinct*. In order for a group to be *distinct*, it must fulfill the objective and subjective elements.¹⁰

Based on their history and culture, the Kurds satisfy the objective elements required to possess the legal right of self-determination. Moreover, all religious groups and sects are allowed to freely follow their religious practices in region. They are a distinct group with a common history that dates back to 2,000 years BC.¹¹ They also satisfy the subjective element of self-determination, as they perceive themselves collectively as ethnic Kurds. National symbols have been displayed throughout the country, in particular the Kurdish flag. In addition to the flag, they have developed a Kurdish national anthem and erected portraits of Kurdish heroes, such as Mustafa Barzani and Mahmud Barznji. Furthermore, the Kurdish culture has a rich oral tradition and literature. Most popular are epic poems called *lawj*, which often tell of adventure in love or battle. Kurdish literature first appeared in the 7th century AD. In 1596, Sharaf Khan composed a history of the Kurds in Persian called the *Sharafnama*. About a hundred years later, in 1695, a great national epic called the *Mem û Zin* was written in Kurdish by Ahmed Khani.

The question is then whether the Kurdistan Region satisfies the criteria for statehood. The qualification of a “state” under public international law is defined by the 1933 Montevideo Convention on the Rights and Duties of States.¹² The Montevideo Convention requires states to possess all four

⁸ The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The right of self-determination is regulated in article 1.2 of the Charter.

⁹ http://www.un.org/en/decolonization/ga_resolutions.shtml, accessed 201707-23. The right of self-determination is also enshrined in Article 1 of both the *International Covenant of Civil and Political Rights* (ICCPR) and the *International Covenant Economic, Social and Cultural Rights*. It is considered essential before any other rights can be recognized.

¹⁰ Jörg Fisch, *The right of self-determination of peoples: the domestication of an illusion*, Cambridge University Press, 2015, p. 35-37.

¹¹ Ferdinand Hennerbichler, *The Origin of Kurds*, Scientific Research, 2012.

¹² <https://www.ilsa.org/jessup/jessup15/Montevideo%20Convention.pdf>, accessed July 23, 2017.

of the following requirements: “[1] A permanent population, [2] a defined territory, [3] a government, and [4] the capacity to enter into relations with other states.”¹³

A Permanent Population

The Kurdistan region satisfies the criteria of having a permanent population, as they have a permanent population of about five million people. This is more than enough to qualify as a state, as there are countries with populations of less than 300,000 people that are recognized by the UN.¹⁴

A Defined Territory

Moreover, the Kurdistan Region meets the defined territory element as even the Iraqi Constitution recognizes the region as a territory.¹⁵ The fact that the boundaries of the Kurdistan Region have not been decisively settled does not disqualify Kurdistan from being considered a state since an entity may satisfy the territorial requirement for statehood even if its boundaries are not settled or some of its territory is claimed by another state.¹⁶

A Government

The Kurdistan Region satisfies the third criteria, because it has a government. Although a state is not required to have any particular form of government, there must be some authority exercising governmental functions. Under Iraq’s Constitution, the Kurdish region is recognized and the constitution gives the Kurdistan Regional Government substantial control of its region.¹⁷ The KRG has the right to cancel federal laws, determine the tax rates of people living in the Kurdish Region, and control the oil and water in the region. In addition, the Kurdistan Regional Government is responsible for security in the Kurdish region and oversees the Peshmerga.

¹³ Ibid, Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.

¹⁴ Andrea O Süilleabhain, *Small States at the United Nations: Diverse Perspectives, Shared Opportunities*, International Peace Institute, 2014, p. 3.

¹⁵ http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf, accessed 2017-07-24. Iraqi Constitution, Section Five, Chapter One, Article 117.

¹⁶ Brian Taylor Sumner, *Territorial Disputes at the International Court of Justice*, Duke Law Journal, Vol. 53:1779, 2004, pp. 1792-1803.

¹⁷ Iraqi Constitution, Section Six, Chapter Two, Article 141.

The Capacity to Enter into Relations with Other States

Finally, the Kurdistan Regional Government has the capacity to enter into relations with other states. In many respects, the Kurdistan Regional Government already is conducting its own foreign policy. The region established a Department of Foreign Relations and appointed a head of the department in 2006 to conduct relations with the international community. Today, the Department of Foreign Relations is an integral part of the government with wide-ranging responsibilities.¹⁸ The Kurdistan Regional Government receives members of foreign governments and conducts both foreign policy and public relations independent of Baghdad. It has also several representative offices worldwide. Furthermore, although foreign embassies are in Baghdad, an increasing number of countries recognizes the need for a consulate in the Kurdish capital of Erbil.

It is quite clear that the Kurdistan Region fulfills the legal requirements of statehood under international law. Nevertheless, the modern debate of statehood seems to look more at the pronouncements of state recognition as mentioned in Articles 3¹⁹ and 6²⁰ of the Montevideo Convention, rather than the legal definition of statehood as regulated in Article 1. Although Articles 3 and 6 of the Montevideo Convention state that the recognition of an entity of as a state is not what makes it a state, the Convention makes room for recognition as a required element for the new state to be able to enter into international relations. Statehood is therefore clearly a product of a balance between the Montevideo criteria and recognition. It is for this reason that it is important not only to highlight the requirements under the Montevideo Convention for statehood, but also to make some statements about why the international community should support the Iraqi Kurds in this matter.

First of all, the arguments against Kurdish sovereignty are outdated. The question is not whether the world should allow the Kurds in Iraq to have an independent state, rather, it is a matter of the international com-

¹⁸ <http://www.dfr.gov.krd/p/p.aspx?p=25&l=12&s=010000&r=332>, accessed July 27, 2017.

¹⁹ Article 3 of the Montevideo Convention: "The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts."

²⁰ Article 6 of the Montevideo Convention: "The recognition of a state merely signifies that the state which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable."

munity catching up with what the Kurds have already done. As was mentioned earlier, the Kurdistan Regional Government has proven that it can stabilize and secure its own territory. Furthermore, the situation for minority groups in Iraq is getting worse due to the sectarian violence that we are witnessing today in Iraq. The Kurdistan Region has been one of the main actors in protection these groups from brutal human rights violation and is home for Muslims, Christians, Turkmen, Bahai's, Mandaean, Yazidis, Shabaks and other minority factions. It is also important to remember that during the so-called "refugee crisis"²¹ in Europe in 2015, when the European countries were busy arguing which country has received most refugees and why some other countries are not taking their responsibility in receiving refugees, the Kurdistan Region hosted around two million refugees and IDPs. And this was despite the budget cuts from Baghdad.²²

Given how the Kurds have been treated in Iraq, it is no surprise that they are demanding the right to self-government. It is therefore time that the international community catches up and assists in building stable, democratic institutions. Supporting the independence of the Kurdish territory would allow democracy to take hold. It would also contribute to political, economic and social stability in the region. There is great potential among the Kurdish leaders to develop a Kurdish state based on the rule of law, respect for democratic rules, and the coexistence between different identities. Furthermore, we have seen the important role of the Kurdistan Region's Peshmerga forces in the fight against the Islamic State and how the Peshmerga have shown the world that they are an internationally recognized military force, which has played a leading role in protecting all religious components. In addition, the Kurdistan Region has more experience with democracy than any other part of Iraq. Thus, if the Western countries are truly committed to spreading democracy in the Middle East, then supporting Kurdish statehood is its best opportunity to see democracy thrive in this region.

²¹ http://ec.europa.eu/echo/what-we-do/humanitarian-aid/refugees-and-internally-displaced-persons_en, accessed July 24, 2017.

²² The Iraqi Constitution, Section Four, Articles 111 and 112. See also Maria Lasa Aresti, *Oil and Gas Revenue Sharing in Iraq*, Natural Resource Governance Institute, 2016, p. 9-10. In 2007 when KRG started to independently sign contracts with international oil companies in accordance with its own oil and gas Law No. 28 of 2007, the Iraqi government demanded that the KRG manage its oil and gas exports to the federal oil export system. In exchange, the Iraqi government agreed to offer a 17 percent share of the total budget allocation to the KRG every year. (Ibid, p. 12.)