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The Legal Status of the Kurdistan Region of Northern Iraq under International Law and Its Implications for the Concept of International Legal Personality

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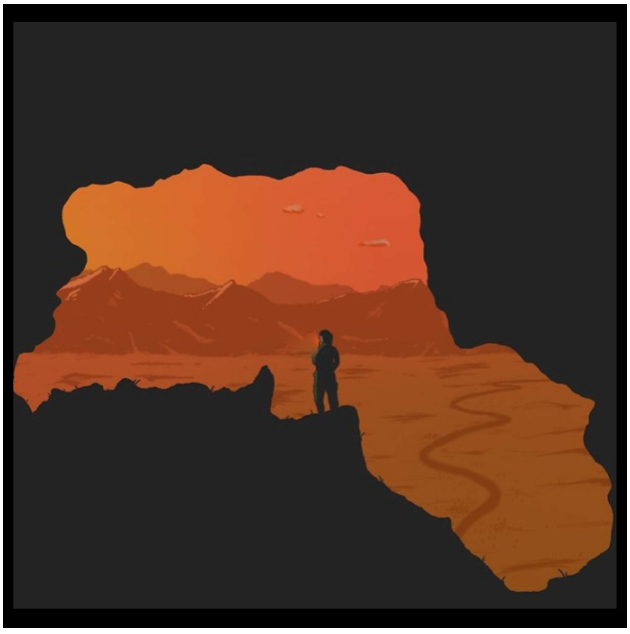
Master Thesis



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Abbreviations

ECHR	European Court of Human Rights
ICJ	International Court of Justice
ILC	International Law Commission
IS	Islamic State
ITC	International Tin Council
KDP	Kurdish Democratic Party
KRG	Kurdistan Regional Government
PUK	Patriotic Union of Kurdistan
UN	United Nations
US	United States

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Introduction

At the moment of writing, the Kurds, unenviably enjoying the status of the largest ethnic group in the world without a state,[1] find themselves on the brink of establishing their first recognized and viable nation-state. This is taking place roughly a century after the Ottoman Empire found an end and the Great Powers drew new borders in the Middle East, which where ultimately manifested in the 1923 Treaty of Lausanne. The Kurds were left out of the equation in the Treaty of Lausanne, and the borders made the Kurds minorities in the newly created states of Iraq, Iran, Turkey and Syria.

Among all the countries inhabited by the Kurds, it is the Kurdistan Region in the Federal Republic of Iraq that holds the greatest deal of autonomy today.[2] Following the Gulf War in 1991 the Kurds lived in an autonomous zone in Northern Iraq. They gained even more autonomy after the United States (US) invasion of Iraq in 2003 and the fall of Saddam Hussein.[3] Situated in a utmost dangerous and turbulent environment, the Kurdistan Region possesses relative independence, which was recognized in the 2005 Constitution of Iraq. Still, it is not a state. The Kurdistan Region is much more than just a federal state in a federal union, possessing, inter alia, independent legislative powers, the right to conclude foreign treaties and the possibility of forming its own regional constitution. Moreover, it has also become an ally to many Western countries in the war beginning in 2014 against the Islamic State (IS) group, whose attacks have left the Federal Republic of Iraq crumbling.[4] In July 2014 these developments led the President of the Kurdistan Region, Massoud Barzani, to request parliament to begin preparations for a referendum on independence,[5] and in May 2015 President Barzani announced in

[1] Chaliand, *A People without a Country,* 1993, p. 7.

[2] Hereafter the Kurdistan Region of Northern Iraq will simply be referred to as 'Kurdistan Region'.

[3] Hadji, *The case for Kurdish statehood in Iraq*, Case W. Res.J.Int'l L., 2009/23, p. 520.

[4] Filkins, *The Fight of Their Lives,* NYT, 16-4-2015 [online]

[5] Coles, *Iraqi Kurdish president asks parliament to prepare for independence vote,* Reuters, 16-4-2015 [online]

Washington DC that 'independence is certainly on its way'.[6] The question arises, what exactly is the legal status of the Kurdistan Region under international law?

In fact, while *de jure* not fully independent, the Kurdistan Region can be said to deal with the Iraqi central government and to some extent even with external powers as equals. This *de facto* autonomy has influenced the development of the Kurdistan Region immensely and has had an impact on its state-building and policies as well as its interaction with the international community. However, in order to take action within legal situations, international legal personality is considered a *condition sine qua non,* implying that without such legal personality an entity would not exist in law and therefore cannot operate in a way recognized by the international legal system nor can it hold responsibility under international law.[7] The question of the legal status of the Kurdistan Region is therefore inherently connected to the investigation of its international personality. In other words: does the entity of the Kurdistan Region possess international legal personality, and if so, to what degree?

In the traditional mainstream definition of international legal personality, states alone may possess such legal personality.[8] However, since the emergence of the traditional subject doctrine, which can be traced back to the Westphalian Peace of 1648, long-established paradigms have been superseded and other approaches to the international legal personality doctrine have materialized. Other entities than states have obtained legal personality during the 20th century.[9] Yet, it remains uncertain if and to what degree non-state entities may possess legal personality. Moreover, as Hans Kelsen criticizes, juristic thinking is not satisfied with the mere concept of rights and duties and for the most part restricts itself to the search for the existence of 'something that "has" the duty or the right'.[10] Consequently, in the debate of international legal personality, a focal

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[6] Atlantic Council, *A Conversation with President Masoud Barzani*, 6-5-2015 [online]

[7] Klabbers, *Legal Personality*, in: *International legal personality*, 2010, p. 4.

[8] Barbara, *International Legal Personality*, A.R.I.E.L.O., 12(1), p. 17.

[9] The international legal personality of the UN was established in *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion*), [1949] ICJ Reports 174.

[10] Kelsen, *General Theory of Law and State,* 1945*,* p. 93.

point remains how and under what circumstances entities that carry those rights and duties can be identified as possessing international legal personality.[11] The question arises if the traditional doctrine of international legal personality is a sufficient explanation for the realities and complexities of international legal relations and in fact, for the reality of the Kurdistan Region.

Therefore, since the Kurdistan Region as a non-state entity in fact acts within international legal situations, not only shall the legal status of the Kurdistan Region under international law and the extent of its possession of international personality be examined, but also what the case of the Kurdistan Region can possibly contribute to the theory of international legal personality.

Turning to the appropriate methodology, the analysis will include theoretical and practical aspects of the concept of legal personality; three different approaches to legal personality will be examined by looking at their scholarly origin as well as at their materialization in legal practice. Following this analysis we will investigate how these conceptions and substantiations fit the case of the Kurdistan Regional Government, shedding light on frictions and tensions that may emanate. Then we will go a step further, utilizing the discussion around the legal personality of the Kurdistan Regional Government to normatively evaluate the fundamental underpinnings of international legal personality.

The first part of this thesis will thus present the theoretical framework in which the Kurdistan Region will be analyzed, discussing three approaches to international legal personality. The first approach presented is the category-based approach, which aims at categorizing the international legal sphere and which identifies beforehand those entities that may hold rights and obligations under international law. The second view explored is the capacity-based approach, which recognizes, within certain limits, all participants of the international legal system as international persons. The third approach is the normative-based approach, contending that individuals are *a priori* international persons as a matter of fundamental legal principle.

[11] Klabbers, *Legal Personality*, in: *International legal personality*, 2010, p. 4.

In the second part, the three approaches will be applied to the case of the Kurdistan Region. The legal status of the Kurdistan Region shall be assessed and it shall be explored if and to what extent the Kurdistan Region can be said to possess international legal personality. Furthermore, this thesis aims to shed light on possible tensions between the different notions of international legal personality and the reality of the Kurdistan Region as a non-state entity in international law.

Finally, following the analysis of the legal status and the international legal personality of the Kurdistan Region, the present situation and its implication for the theory of international legal personality shall be discussed in the third part of this thesis.

PART I

The Theoretical Framework: Approaches to International Legal Personality

The word "personality" is derived from the Latin word *persona* and initially referred to the masks worn by mimes on stage, whereby the different masks portrayed the different characters in the play. In psychology, Carl Jung used the term *persona* to describe the interrelation of the individual with its environment, the *persona* or mask symbolizing the role that a person plays in society, ultimately hiding her real self.[12] This could be translated to the concept of international legal personality which may serve as a legal mask, allowing groups to hide their raw self and to present their more polished self and wants.

Similar to the domestic law system, the concept of personality is utilized in international law to differentiate between those actors the international legal system recognizes and those that are precluded.[13] An entity possessing international rights and duties and holding the capacity to preserve these rights by bringing claims and taking responsibility for its breaches of obligations is considered a subject of international law.[14]

Yet, in the international legal system, a clearly established international law of persons is absent. There is neither a treaty nor customary international law stipulating an unambiguous international law of persons. This makes it difficult to identify the subjects of international law.

Hence, there are various viewpoints on the question of which entities are considered persons in international law and what the specific consequences of this status suggest. In fact, what entities will be entitled to what rights and in what circumstances hinges on the extent and nature of the law. As Shaw points out, in order to determine personality, certain notions within the law must be explored, such as status, capacity, competence and the nature and scope of certain rights and obligations. The legal status of

[12] Jung, *Zwei Schriften über analytische Psychologie,* 1964, p. 183.

[13] Portmann, *Legal Personality in International Law*, 2010, p. 5.

[14] Crawford, *Brownlie's Principles of public international law*, 2012, p. 115.

a particular entity may be decisive for the powers and duties it may hold, and capacity connects the status of a person with the specific rights and obligations.[15] Different views about the system of law will resonate in different views about the nature and identity of international legal persons.[16]

But international personality does not only imply the quality of holding certain rights, obligations and capacities under the law; it also comprises the competence to create the law.[17] The interconnectedness of international legal personality and the creation of law is a consequence of the absence of a centralized legislator in the international legal structure. The decentralized creation of law rests on those states which are considered to possess full international legal personality. This stands in contrast to domestic private law where the law-creation is in the hands of a centralized state. International law is considered to emerge mainly from the will of states, which bring international law to life by various forms of explicit and implicit arrangements.

In order to be able to determine the legal status and the degree of legal personality the Kurdistan Region possesses in the international sphere in Part II of this thesis, it is necessary to first create the theoretical framework in which the Kurdistan Region is placed and to introduce the different concepts, or rather *conceptions,* of legal international personality. There are many different theories as to what international personality entails. Considering the restricted size of this essay, only the most dominant approaches shall be presented.

In the following, a comprehensive illustration of three approaches shall be discussed: the category-based approach, the capacity-based approach and the normative-based approach. Part II will subsequently investigate how these theories can be applied to the Kurdistan Region.

[15] Shaw, *International law*, 2014, p. 142.

[16] Ibid, p. 143.

[17] Portmann, *Legal Personality in International Law*, 2010, p. 8.

I.I The Category-Based Approach

The category-based approach is reflected in every legal textbook and dominated legal thinking for a long time. In essence, the category-based approach aims at categorizing participants in the international legal system. Participants in the international legal sphere are categorized as states, international organizations, non-governmental organizations, multinational corporations as well as individuals.[18] In this approach there is a foregoing presumption as to who is a legal person. Generally, states are considered to be the original bearers of international legal personality. However, after World War II there has been a considerable evolvement and shift in legal thinking, and the possibility of including other entities than states in the exclusive circle of international actors possessing international legal personality materialized.

Even though to this day states alone are considered to possess full international legal personality, the contemporary legal community now recognizes that other non-state entities may possess international legal personality to some extent as well. In the following, a closer look shall be taken at categories that, according to the mainstream opinion, may carry some degree of international legal personality.

I.I.I States and other Categories

The realm of international relations is characterized by rules and principles that provide a normative groundwork for action. This groundwork can be traced back to the Peace of Westphalia in 1648, when the Thirty Years' War ended, and is generally considered as providing the base for the emerging system of states. State sovereignty was established as the fundamental principle for the structure of the emerging state system with the state at the center with unrefuted authority.[19] The Peace of Westphalia is regarded as the birth date of 'modern' international law. The Westphalian view dominated with the perception

[18] Shaw, *International law*, 2014, p. 143.

[19] Cutler, *Critical Reflections on the Westphalian Assumptions*, 2001, p. 135.

that international law binds sovereign states upon their acceptance. This traditional understanding of international law, wherein only states may possess international legal personality continued to be the mainstream view into the 20th century. The notion of the binding nature of a strictly positive international law was mainly put forward by Dionisio Anzilotti, Lassa Oppenheim and Heinrich Triepel. In this positivist view, the international legal system is divided into objects and subjects. And only states are the subjects of international law, subjects being those entities that carry rights and duties, without the need for the community to intervene.[20] Sir Hersch Lauterpacht, an opponent of the positivist view, observes that in the first half of the 20th century, even

> '*In those cases in which individuals seem to derive benefits under international law, the predominant view has been that such benefits are enjoyed not by virtue of a right which international law gives to the individual but by reason of a right appertaining to the State of which the individual is a national. The right is a right of the State; the individual is the object of that right '.*[21]

Still, in the absence of a treaty or customary international law providing a clear definition of an international law of persons, the concept of international personality remained rather vague. After World War II there was a growing understanding that international law, even though primarily applying only to states, is relevant to other international categories of actors as well.[22] The distinct characteristic of contemporary international law is the wide spectrum of participants, but also their categorization; non-state actors such as international and regional organizations, multinational corporations, subnational governments and individuals. All of them act with some amount of influence on the international stage.

[20] Anzilotti, *Cours de droit international*, 1929, p. 134.

[21] Lauterpacht, *The Subjects of the Law of Nations*, in: *International legal personality*, 2010, p. 175.

[22] Higgins, *Problems and Process*, 1994, p. 39.

A single relevant authoritative statement gave many scholars direction amidst the hazy concept of international legal personality. The ICJ acknowledged the plurality of models of personality in the *Reparations for Injuries* case, attesting that:

> *'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights.'*[23]

Furthermore, the International Court of Justice expressed in the *Reparation for Injuries* Advisory Opinion:

> *'An international person (...) is capable of possessing international rights and duties and (...) has capacity to maintain its rights by bringing international claims.'*[24]

Recognizing the United Nations (UN) as an international legal person, the International Court of Justice established in the *Reparations for Injuries* case that the degree of personality that may be held by international organizations is derived from and commanded by the member states, but states alone enjoy recognition as full members of the UN.[25] The idea that states as primary subjects of international law may recognize other categories of international actors possessing some degree of international legal personality as well, is an evolvement from the traditionalist approach. The Court's intent was essentially to open up the international legal system to a non-state entity, while avoiding challenging the international legal system or the accompanying presumption of the dominance of states:[26]

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[23] *Reparation for Injuries*, at 178.

[24] *Reparation for Injuries*, at 179.

[25] *Reparation for Injuries*, at 180 quoted in: Klabbers, *An introduction to International Institutional Law*, 2002, p. 56.

[26] Portmann, *Legal Personality in International Law*, 2010, p. 100.

> '*Fifty states, representing the vast majority of the members of the international community, have the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognized by them alone, together with capacity to bring international claims.*'[27]

In fact, states alone may obtain territory, declare war or designate ambassadors. States alone can bring contentious disputes before the International Court of Justice, as Art. 34 (1) of the Statute of the International Court of Justice stipulates. And states alone hold the right to territorial integrity, a right stated in the UN Charter.[28] Also, the Vienna Convention of the Law of Treaties applies only to states. Furthermore, there is the unresolved question whether the personality of international organizations such as the UN encompasses an inherent legal capacity to act independently from that implied in its establishing instruments. Therefore, despite an increasing number of other actors and a reluctant recognition of international organizations as possessing some degree of international personality, still to this day, states remain undoubtedly the most important legal persons in the international legal sphere.[29] The *Reparation for Injuries* case thus fails to provide much guidance, for it provides no conclusive hints as to which categories, apart from international organization, may possess international personality or as to what criteria apply for the attribution of personality. The dominance of the mainstream traditionalist approach of international legal personality seems to be fading and other conceptions are making themselves visible on the international stage.

In the following, a different approach shall be presented, which in fact reverses the logic of the category approach, and where an *a priori* acknowledgement of international legal personality is not necessary for an entity to 'become' an international legal person. Rather, the capacity-based approach considers every entity that holds the capacity to act in the international legal system a legal person.

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[27] *Reparation for Injuries*, at 179.

[28] Art. 2 Charter of the United Nations

[29] Shaw, *International law*, 2014, p. 143.

I.II The Capacity-Based Approach

The capacity-based approach refrains from the notion that a participant in the international legal order must first possess international legal personality before it may participate legitimately in the legal sphere. Rather, the capacity-based view acknowledges all entities that effectively exercise power in the international sphere as international legal persons.[30] This approach was essentially put forward by Myers S. McDougal, Harold D. Lasswell and Rosalyn Higgins after the end of World War II. McDougal views the legal system not so much as a set of rules, but rather as:

> *'A whole process of decision, and a process of decision taking place within the context of, and as a response to, a larger community process.'*[31]

Therefore, the international legal order is not qualified as a system of rules, but as a process of authoritative decision-making. Here, participation depends solely on factual power, in other words; where persons have enough power to secure consequential and substantial control.[32] Furthermore, as Higgins points out, the capacity-based approach abandons the subject-object dichotomy. Instead of the concept of *subjects* or *persons*, there is the assumption of *participants* in the international legal system.[33] McDougal notes here:

> *'Contemporary theory about international law, obsessed by a technical conception of the subjects of international law, continues, however, greatly to*

[30] Portmann, *Legal Personality in International Law*, p. 208, 2010.

[31] McDougal, *Law as a Process of Decision*, Nat. LF, 1956, p. 56.

[32] McDougal et al, *Human Rights and World Public OrdeOrder, 1980.*

[33] Higgins, *Conceptual Thinking*, Br J Int Stud, 1978, p.5.

over-estimate the role of the "nation-state" and to underestimate the role of all these other new participants."[34]

In the absence of a legal rule bestowing legal capacity onto an entity and permitting it to participate in this process, all actors that are factually participating in authoritative international decision-making processes are considered to be participants of the international legal order and thus international legal persons.[35] Thus, participation is not founded on legal rules or acts of recognition, but on the power to effectively participate. This, as Nijman argues, can be considered an act of *inclusion,* different from the approach the international legal scholars used over the centuries, namely to either '*include* or *exclude* particular entities in or from relevant international processes, or in other words, in or from the international community'.[36] Therefore, in order to identify the international actors, one has to observe and determine the entities that take part in decision-making processes and which factually possess the capacities to act in the international legal system.[37] Finn Seyersted, among other Scandinavian authors, advances a form of the capacity-based approach, but focuses mainly on the role of international organizations:

'Intergovernmental organizations, like States, have an inherent legal capacity to perform any 'sovereign' or international acts which they are in a practical position to perform. They are in principle, from a legal point of view, general subjects of international law, in basically the same manner as States. There is essentially no more reason to maintain that all those powers which intergovernmental organizations in fact exercise, or which they have the capacity to exercise if and when the practical case arises, follow from the provisions of the constitution or from the intention of the contracting parties (...) these powers

[34] McDougal, *A Contemporary Conception*, p. 161, quoted in: Nijman, *The concept of international legal personality,* 2004, p. 332.

[35] McDougal et al, *The World Constitutive Process*, 1967, J. Legal Educ., p. 262.

[36] Nijman, *The concept of international legal personality,* 2004, p. 333.

[37] Portmann, *Legal Personality in International Law*, 2010, p. 212.

> *are exercised once an independent or sovereign Organization or State has been established as an objective fact, however silent the constitution may be or whatever may have been present in the mind of the drafters when they drew up the constitution.'*[38]

In legal practice, the capacity-based approach has mainly manifested itself in the context of international organizations. This approach is reflected in different case law, such as *The Bank for International Settlements Arbitration,* where the arbitral tribunal by unambiguous implication announced the Bank for International Settlements an international person. The reasoning of the tribunal reflected a capacity-based approach, where the international legal personality of the Bank was inferred from its factual performances for 'legitimate international public purposes'.[39] Also, the international personality of the International Tin Council (ITC) was established in the *International Tin Council cases*.[40] Following the capacity-based approach, the ITC was considered to possess international legal personality because it was acting as an independent organ and had its own decision-making powers.[41] This approach was later also adhered to by the International Law Commission (ILC) in the project on the responsibility of international organizations, and the Institut de Droit International. It was Higgins, then rapporteur to the Institut de Droit International, who suggested that the personality of international organizations should be considered primarily a matter of 'objective reality', reflecting, inter alia, structure, powers and functions that can be opposed to third parties independent from any act of recognition by those third parties.[42] Essentially, the capacity-based view regards participants in the international legal system functionally akin to an international legal person. However, as Shaw notes, a precise directory of capacities needed for an

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[38] Seyersted, *Objective International Personality,* Nordisk Tidsskrift Int'l Ret, 1964, p. 29.

[39] *Reineccius et al. v. Bank for International Settlements* (Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares, Permanent Court of Arbitration, 2002), 15 World Trade and Arbitration Materials 73, para. 158.

[40] *Maclaine Watson & Company Limited v. International Tin Council* (House of Lords, 1989), 29 ILM 670.

[41] Portmann, *Legal Personality in International Law*, 2010, p. 236.

[42] Ibid, p. 238.

entity to qualify as international legal person is difficult to list in advance and will vary from case to case.[43]

Similar to the capacity-based approach, the normative-based approach is also discarding the positivist view and the subject-object dichotomy. In the following section the normative-based view shall be explored.

I.III The Normative-Based Approach

In the traditionalist, positivist view, individuals are objects of international law. This view assumes that 'some specific rule is required "permitting" the individual to be a "subject" of international law'.[44] The argument of the orthodox view against recognizing individuals as subjects of international law focuses on the non-participation of the individual in the creation of law: since individuals do not participate and cannot access international courts to invoke their rights, they are not subjects but objects of international law. However, this positivist view has been rejected by many scholars, who formulate theories that include individuals as subjects under international law and aim at a reversal of the traditional view.[45]

According to Jan Klabbers, the two contending theories of Friedrich Carl von Savigny and Kelsen are the most prevalent.[46] Von Savigny initiated the transition of the classic idea of personality into a fictitious notion. He disconnects the legal person from the natural person; the legal person has no will and ability except to the degree the law ascribes to it. In the Kelsenian Pure Theory of Law, on the other hand, the legal person cannot be separated from its rights and obligations; it is essentially a 'personified unity of a set of legal norms'.[47] Kelsen draws from the theory of international legal personality as

[43] Shaw, *International law*, 2014, p. 192.

[44] Higgins, *Problems and process*, 1994, p. 49.

[45] Nijman, *The concept of international legal personality,* 2004, p. 315.

[46] Klabbers, *Legal Personality*, in: *International legal personality*, 2010, p. 10.

[47] Kelsen, *General Theory of Law and State*, 1945, p. 93.

legal fiction, but for him it is also a *Zurechnungspunkt*, a point of attribution, including the individual and other international actors in the concept of international legal personality.[48] Consequentially, as Klabbers notes, there is no gap between recognized and unrecognized groups in the Kelsenian theory. This suggests that one can possess personality in various degrees.[49] Ultimately, Kelsen rejects the conventional concept of the state-centered notion of international legal personality. In his view, the traditional perspective ignores the fact that the purpose of international law is the regulation of individual human behavior, analogous to any domestic legal order. However, even if Kelsen dismisses the traditional concept of legal person, he believes that individuals can only realize their freedom, morality and individuality as a part of the state. According to Kelsen, individual freedom would only be possible collectively, within the state society.[50]

The individualistic view was also powerfully put forward by Lauterpacht after the end of World War II. Lauterpacht, similarly to Kelsen, considers the individual a legal subject. Lauterpacht notes:

> *'The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them. Thus in relations to the current view that the rights of the alien within foreign territory are the rights of his state and not his own, the correct way of stating the legal position is not that the state asserts is own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere.'*[51]

Furthermore, Lauterpacht observes that if one acknowledges the general principles of law as an independent source of international law, the state does not need to consent to the

[48] Nijman, *Non-State Actors and the International Rule of Law*, 2009, p. 22.

[49] Klabbers, *Legal Personality*, in: *International legal personality*, 2010, p. 15.

[50] Nijman, *The concept of international legal personality,* 2004, p. 188.

[51] Lauterpacht, *International Law and Human Rights*, 1950, p. 27.

international legal personality of individuals, since in this perception, a general principle of law considers the individual the final subject of all law.[52]

Both Lauterpacht and Kelsen think of the state as representing the individual and intermediating between the individual and international interest. Higgins goes a step further and suggests that the principle equally applies to individuals, even without the interference of an international instrument. According to Higgins, individuals can in fact benefit from international law rights, which states are supposed to follow as a matter of general international law.[53] The state simply represents a theoretic vessel created by individuals with the aim to follow their own interests. It follows that the state exists in order to protect the interests, welfare and freedom of the individuals that are part of it.[54] The corollary of this is that there is no fundamental difference between the interest of the state and the interest of the individual. However, the state does not by definition protect all individual interests and the individual may take part in the international sphere in order to engage in specific transactions and international law can endow the individual with rights and duties.[55] Moreover, states always act through individuals, and those individuals who are entrusted to represent the group of individuals under the umbrella of the state have a personal responsibility for their actions and should not be able to use the state as a shield.[56]

The manifestation in legal practice of the individualistic view of international legal personality came with the Nuremberg trials, when twelve Nazi defendants received the death sentence and seven were imprisoned for committing international crimes. The individuals were considered responsible for international crimes, because such crimes violate the fundamental values of the international community. Since then, international and national courts have embraced the principle of individual responsibility for international crimes. In fact, the individualistic approach provides for much of the human

[52] Ibid, p. 9.

[53] Higgins, *Problems and process*, 1994, p. 54.

[54] Lauterpacht, *Analogies, 1927, p.72.*

[55] Lauterpacht, *The Subjects of the Law of Nations*, in: *International legal personality*, 2010, p. 510.

[56] Ibid, p. 532.

rights practice of the European Court of Human Rights (ECHR).[57] The ECHR's approach to human rights law can be seen to imply the perception that the individual is an international person in the European human rights system.[58] Moreover, individual responsibility is strongly assumed with international crimes. This became apparent in the *Bosnian Genocide Case,* where the ICJ established a dual criminal responsibility in international law, namely that of the individual and that of the state.[59] The individual can thus be responsible for violating a fundamental value of the international community.[60]

Now that we have elaborated the three approaches to international legal personality, we will turn to applying these views to the reality of the Kurdistan Region in Northern Iraq.

[57] Ibid, p. 154.

[58] Ibid, p. 172.

[59] *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007 43, paras. 155-79.

[60] Portmann, *Legal Personality in International Law*, 2010, p. 161.

PART II

The Legal Status of the Kurdistan Region in Northern Iraq: Conceptualizing the Kurdistan Region of Northern Iraq in International law

In the following, a short but succinct overview shall be given of the Kurdistan Region's development in the past decades up to its unique position today. Then, the legal status of the Kurdistan Region will be analyzed within the framework of the Federal Republic of Iraq and its legal status in international law shall be examined. In addition, the degree to which the Kurdistan Region can be said to possess international legal personality shall be assessed.

II.I. Historical Background

Since the states of Turkey, Syria, Iran and Iraq that the Kurds inhabit today were carved out of the ruins of the former Ottoman Empire in the 1920s, the history of the Kurds has been scarred by oppression, invasion and genocide. In Iraq the atrocities occurred notably at the hands of Saddam Hussein. The Kurds still refer to the 1980s as the War of Annihilation, a genocide where almost two hundred thousand Kurdish civilians were killed by Hussein's troops.[61] The Iraqi military launched what is known as the Anfal campaign in the late 1980s, using chemical weapons against the Kurds and deporting and executing Kurdish civilians.

In 1991, at the end of the Gulf War and after the Kurds' uprising against Hussein, and the international concern for Kurdish refugees peaked, the UN Security Council passed Resolution 688, which provided a 'safe heaven' for the Iraqi Kurds. Shortly after, the International Coalition Forces declared a large part of northern Iraq a no-fly zone. As a consequence, Hussein pulled his administration back from northern Iraq. This led to the first legislative elections in the history of Iraqi Kurdistan in May 1992. The two

[61] Hadji, *The case for Kurdish statehood in Iraq*, Case W. Res.J.Int'l L., 2009/*41*, p. 518.

dominating parties of Iraqi Kurdistan, Barzani's Kurdish Democratic Party (KDP) and Talabani's Patriotic Union of Kurdistan (PUK) formed their own parliament and regional government, exercising autonomous control over the Kurdish territory.[62] This marked the starting point of effective self-government, however it was stained by internecine rivalry between the KDP and PUK until the late 1990s.

The removal of Hussein's regime by the US in April 2003 offered an opportunity to the Kurds, which they did not fail to seize. Their alliance with the US was bearing fruit. In little time they succeeded in cementing their control in the Kurdish region, fused the two administrations of the KDP and PUK, which were still running parallel up to that point, and pervaded the administrational apparatus and government of the new federal Iraq, to the extent that without Kurdish approval the new constitution of Iraq could not be passed. This effectively meant that the Kurds were able to participate with leverage at the negotiating table. As a result a constitution was passed that reflected not only a post-Hussein Iraq but Kurdish interests as well. It made Iraq one of the first federations in the Middle East, and the Kurdish region, even though nominally part of Iraq, was attributed with most characteristics of an independent state.

In the following years, the Kurdistan region flourished, the economy boomed and the Kurds' sentiment of distance from greater Iraq was only growing by the increasing divergence of the standard of life of the Kurds and the rest of Iraq. The most debated subject during negotiations concerning the 2005 Constitution was doubtless the distribution of Iraq's oil wealth, a very powerful factor that could be crucial for the Kurdish Region's viability. The Kurds secured the right to supervise new oil and gas findings and made sure to include a provision by which local law would prevail if the domestic and central governments conflicted. Under the Iraqi Constitution, the Kurdish region was to receive seventeen percent of Iraq's total oil revenues. However, since 2003 the Kurds had opened their oil fields to Western companies and many companies, inter alia ExxonMobil and Chevron, now work in the Kurdistan Region.[63] Iraqi officials had

[62] Hiltermann, *To Protect or to Project? Iraqi Kurds and Their Future,* Crisis Group, 4-6-2008, [online]

[63] Filkins, *The Fight of Their Lives,* NYT, 16-4-2015 [online]

been accusing the Kurds for years of unilaterally exporting oil, in suspicion of Kurdish plans towards independence. In October 2013 the Kurds opened a pipeline through Turkey, without the approval of Baghdad. The conflict between Baghdad and the Kurdistan Region escalated and the former prime minister of Iraq, Nouri al-Maliki, blocked all payments to the Kurdistan Region in February 2014, cutting the Kurdistan Region off from most of its funds.

In June 2014 the IS swept into Iraq. The group not only brought immense terror, but also led to an instant collapse of a virtually ghost-like Iraqi army. At first, the Peshmerga, the Kurdish army, seemed to be able to effectively fight the IS. Moreover, they seized oil-rich and largely Kurdish-populated regions that up until that point were still under the control of Baghdad. Subsequently, President Barzani asked his parliament to prepare for a referendum for independence. However, the Peshmerga quickly experienced major setbacks and it became clear that the Kurdistan Region needed (and in fact still needs today) international support as practically the only force to fight IS in that region. The US and other Western countries are now supporting the Kurds in their fight against IS.[64]

With the history of the Kurdistan Region in mind, we will now turn to a determination of its legal status under international law, and the implications of this history upon such a determination.

II.II. Legal Status of the Kurdistan Region within the Federal Republic of Iraq

To determine the legal status of the Kurdistan Region, we will first analyze it in the context of the Federal Republic of Iraq, before examining its status in international law.

As mentioned before, the Republic of Iraq is a federation. Art. 1 of the Iraqi Constitution 2005 defines the Republic of Iraq as:

[64] Focus Online, *Der Westen liefert Waffen an Kurden im Irak*, 27-8-2014 [online]

> *'A single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic (...).'*[65]

William Riker provides an authoritative definition of Federalism; it is a political form that does not follow a clear-cut model but that exists in different shapes. In his definition, federalism is a:

> *'Political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions.'*[66]

Thus, a federation can be described as an entity split into sub-units. Within Iraq, it is only the Kurdistan Region, which has a recognized regional government and which can be identified as a sub-unit of the federation of Iraq. However, considering the Kurdistan Region's everlasting strive for increasing autonomy and the external pressure on the Iraqis by the US to form a federation after Hussein's defeat, the ideology of federation does not seem to be deeply engrained in the political consciousness of the Republic of Iraq.

The Kurdistan Region, a parliamentary democracy with a multi-party system, is subservient to the Republic of Iraq, but possesses considerable powers as a region with great autonomy. There is no doubt that the economic and political activities of the Kurdistan Region are the cause of great animosity for the central government in Baghdad. Even though the Kurdistan Region has not formally declared independence, it held a referendum on independence in 2005. The results were crystal clear. 98.9% voted for secession from Iraq.[67] Almost ten years later, in summer 2014, President Barzani called the parliament to prepare for a new referendum. As of July 2015 this has not happened yet. However, in May 2015, on a visit to Washington DC, President Barzani seemed

[65] Iraqi Constitution 2005 [online via www.iraqinationality.gov.iq]

[66] Riker et al., *Handbook of political science*, 1975, p.101.

[67] MacQueen, *Iraq's Kurdistan Regional Government*, 2015, p.8.

confident that independence for the Kurdistan Region would become a reality in the near future, as soon as the imminent threat of IS in Iraq should cease.[68]

The history and recent developments mentioned above indicate that the Kurdistan Region is not simply a federal state within the federation of Iraq. The Kurdistan Region's autonomy and its call for independence suggest that it might be more than that. In order to be able to make a sharper determination of the Kurdistan Region's legal status in international law and its international legal personality, the category-based, capacity-based and normative-based approaches shall be applied to the Kurdistan Region.

II.III The Kurdistan Region and the Category-Based Approach

As we have observed in Part I, the category approach aims at categorizing the international legal sphere. Only states possess full international legal personality, even though other entities, such as international organizations, can carry international legal personality to a certain extent. Which entities may possess rights and duties under international law is therefore identified beforehand in this approach.

Applying this approach to the Kurdistan Region, one must thus first determine to which category this entity belongs. We have already examined its status as a federal state within the federation of Iraq. However, the Kurdistan Region's autonomous position and call for independence seem to urge for a more refined definition of its legal status. Of course, a federation such as the Federal Republic of Iraq will itself have personality. The category-based approach would aim to answer the question of international personality of the component elements of the federation in the light of the constitution and practices of the state concerned. In fact, the component states of a federation that have been endowed with a certain extent of international competence may consequently be recognized to possess a degree of international personality. This was the case when the then Soviet Republics of Byelorussia and the Ukraine were accepted as members of the UN in 1945

[68] Atlantic Council, *A Conversation with H.E. Masoud Barzani*, 6-5-2015 [online]

and were considered international legal persons to that extent.[69] However, the very extensive autonomy, in fact the practically absolute autonomy, of the Kurdistan Region along with its unconcealed wish for independence suggest that the Kurdistan Region has already disrupted the framework of a federal state. But, if not a federal state, what is it then? Can the Kurdistan Region already be considered a state? In order to examine whether the Kurdistan Region may in fact already have achieved statehood and thus may make a claim to full international legal personality under the category-based approach, we need to examine whether this entity fulfills the criteria of statehood.

II.III.I The Question of Statehood of the Kurdistan Region

The most widely accepted formulation of the criteria of statehood in international law is laid down in Article 1 of the Montevideo Convention on Rights and Duties of States of 1933. The basic principles of statehood according to this Convention are a permanent population, defined territory, a functioning government and the capacity to enter into relations with other states. Moreover, faced with the question of secession in the Socialist Federal Republic of Yugoslavia in 1991, the Arbitration Commission of the European Conference on Yugoslavia noted in its Opinion No. 1 that conditions on which an entity constitutes a state should be based on the principles of public international law. The Commission stated in its opinion that

> *'The State is commonly defined as a community which consists of a territory and a population subject to an organized political authority' and 'that such a State is characterized by sovereignty', adding that 'the form of internal political organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government's sway over the population and the territory'.*[70]

[69] Shaw, *International law*, 2014, p. 158.

[70] A/46/804, 18 December 1991, Opinion No. 1.

A permanent population is therefore considered necessary for statehood, though there exists no precondition of a specified minimum number of inhabitants.[71] Clearly, the Kurdistan region fulfills this first principle; the Iraqi Kurds are a permanent population of approximately four million people.[72]

Furthermore, the requirement of a defined territory is satisfied if a consistent base of territory exists which is under the control of the government of the presumed state. This is also the case with the Kurdistan Region. It is in control of its territory and currently successfully defending it against IS, with the support of the US. Even though the boundaries are not clear-cut and perhaps have become even more vague since IS entered Iraq and the Kurds seized the largely Kurdish-populated regions in 2014 that formerly were under the control of Baghdad, it is generally not deemed necessary for the fulfillment of the principle of defined territory, that the boundaries are defined in detail or settled, nor is there any rule of territorial contiguity.[73]

Not always is a functioning government a precondition for statehood, since a lack of effective central control may be compensated by international recognition. Another relevant factor might be the extent to which an area not controlled by the government is claimed by a different state under international law and disconnected from *de facto* control. Notwithstanding, a foundation of effective control remains essential for statehood.[74] This requirement is easily fulfilled by the Kurdistan Region. Under the Iraq Constitution it retains substantial control over its territory.[75] Not only does the Kurdistan Region have the power to revoke federal laws and control the water and oil of its territory, but the Kurdistan Region also determines the tax rate of its people and oversees its own military apparatus.[76]

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[71] Crawford, *Creation of States in International Law*, 2007, p. 52.

[72] Stansfield, *Iraqi Kurdistan,* 2003, p. 2.

[73] Crawford, *Israel and Palestine: Two Studies in the Creation of States, R.* Int'l L, 1999, p. 113.

[74] Shaw, *International law,* 2014, p. 146.

[75] Iraqi Constitution 2005, Artt. 4, 113, 137 [online via hwww.iraqinationality.gov.iq]

[76] Katzman, *Iraq: Post-Saddam governance and security,* 2009, p. 5.

The capacity to enter into relations with other states is not limited to states, since other entities can enter such relations under the rules of international law as well. Foreign policy is normally conducted by sovereign states. However, the Kurdistan Region is already handling its own foreign policy. The Kurdistan Region established its own Department of Foreign Relations in 2006 to 'conduct relations with the international community' and also has numerous representative offices worldwide.[77] The Kurdistan Region's foreign policy and public relations are conducted independently from Baghdad. In February 2015 President Barzani participated at the Munich Security Conference and met with a number of world leaders and officials, including German Chancellor Angela Merkel.[78] Three months later, in May 2015, President Barzani met with President Obama and Vice-President Biden to discuss the military support and strategy in the fight against IS.[79] The flags shown at the press conferences were not those of Iraq, but of the Kurdistan Region.

Still, an effective government is directly related to the idea of an independent state.[80] The competence in this sense relies on the one hand on the power of the international government of a territory that carries an international obligation into effect and on the other hand on the independence of the concerned entity, so that these parties are the sole carriers of responsibility. As Crawford notes:

> 'The *capacity to enter into relations with other States, in the sense in which it might be a useful criterion, is a conflation of the requirements of government and independence.*'[81]

[77] The Kurdistan Regional Government Department of Foreign Relations, 15-6-2015 [online]

[78] Kurdistan Region Presidency, *President Barzani Meets German Chancellor Merkel in Munich,* 7-2-2015 [online]

[79] Knights, *A big win for Kurds at the White House,* 15-5-2015*,* [online]

[80] Raič, *Statehood and the Law of Self-Determination,* 2002, p. 73

[81] Crawford, *Creation of States in International Law*, 2007, p. 62.

Independence is essential to the concept of statehood; to become a state a territorial and political entity must possess independence.[82] With the loss of independence the state will inevitably vanish too:

> *'La perte de l'indépendance coïncide nécessairement avec la disparition de l'Etat.'* [83]

Independence can be considered a formal statement that the state is not subject to any other sovereignty and remains unaffected by the rules of international law or by a factual dependence upon other states. Still, a certain extent of factual as well as formal independence may be necessary, too.[84] Applying this to the Kurdistan Region, it becomes apparent that factual independence may already be a reality, as the financial support from Baghdad is felt but not necessary; oil contracts with states like Turkey or international corporations seem to secure the Kurdistan Region's financial independence. However, a formal statement of independence is still anticipated. This could be achieved if the long awaited referendum takes place and the Kurdistan region decides in favor of independence and secession from Iraq. History has taught that independence in different forms has been acknowledged, such as in the cases of Kosovo and Bosnia when acknowledgement happened despite the fact certain governmental functions were to be placed with an outside body.[85]

It has been shown that criteria for statehood can be retrieved from numerous provisions, however, those are not exhaustive. In fact, other concepts, such as self-determination are also be relevant to determine the legal status of the Kurdistan Region and the relative importance given to the different factors may vary according to the

[82] Raič, *Statehood and the Law of Self-Determination,* 2002, p. 73.

[83] Rousseau, *Droit International Public*, quoted in: Rieter, & de Waele, *Evolving Principles*, 2011, p. 30.

[84] Shaw, *International Law*, 2014, p. 147.

[85] Ibid, p. 148.

situation.[86] Therefore, it is necessary to explore whether the Kurdistan Region possesses the right to self-determination.

The concept of the right of self-determination was introduced by President Woodrow Wilson to the League of Nations in 1919. Self-determination was described as:

> *'The right of every people to choose the sovereign under which they live, to be free of alien masters, and not to be handed about from sovereign to sovereign as if they were property'.*[87]

The notion of self-determination was not included in the League of Nations Covenant, but after World War II it found a place in the UN Charter. Article 1(2) of the UN Charter states one of the purposes of the UN:

> *'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples (...).*'

Although the majority view seems to deny recognition of the right to self-determination as a binding right, practice within the UN can be considered as having ultimately secured legal standing of the right in international law, which may be accomplished by treaty or custom or, more disputably, by constituting a general principle of law.[88] In 1966 the International Covenants on Human Rights were adopted by the General Assembly. Coming into force a decade later, both covenants constitute in their first article that:

> *'All peoples have the right of self-determination, including the right to determine their political status and freely pursue their economic, social and cultural development.'*

[86] Ibid, p. 144.

[87] Quoted in Cass, *Re-thinking Self-Determination*, 1992, p 23.

[88] Shaw, *International Law*, 2014, p. 184.

A distinction is to be made between the internal right to self-determination, which may be exercised within the confines of a state and which includes the right for a people to freely choose its own political and economic regime,[89] or external self-determination, which effectively means the creation of a new state. In the landmark ruling *Reference re Secession of Quebec* the Supreme Court of Canada addressed the right to internal self-determination when it answered the question whether Quebec could secede from Canada. The Supreme Court noted that:

> *'The recognized sources of international law establish that the right to self-determination is fulfilled through internal self-determination'* [90]

Furthermore, according to the Supreme Court, external determination could only be exercised in exceptional circumstances, when the rights the people are massively and gravely violated.[91] Applying the criteria for internal self-determination to the Kurds, it becomes apparent that since the fall of Hussein's regime in 2003 the Kurds have achieved a form of internal self-determination, for they are able to freely and democratically choose their political regime within their own region.

However, there is also a strong case for external self-determination to be made here. External self-determination may be exercised in different ways: independence, integration with a neighboring state, free association with an independent state, or any other political status freely chosen by the people concerned.[92] External self-determination is also linked to the principle of territorial integrity, so as to provide protection to the territorial framework of the colonial period in the process of decolonization, with the aim of preventing a rule from emerging that would possibly permit secession from independent states. The Canadian Supreme Court echoed this idea in the *Reference re Secession of Quebec* case, stating that the right of self-determination is expected to be

[89] Cassese, *Self-Determination of Peoples*, 1995, p. 101.

[90] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 126.

[91] *Reference re Secession of Quebec*, para. 138.

[92] *Western Sahara Case*, ICJ Reports, pp. 12, 33 and 68.

exercised within the framework of existing sovereign states while maintaining the territorial integrity of those states and that a right to external self-determination, i.e. the right to unilateral secession arises only in the most extreme cases.[93] However, as Shaw notes, self-determination as a concept is capable of evolving further so as to incorporate the right to secession from existing states.

When a group, such as the Kurdish people, falls victim to genocide and possesses a legitimate territorial claim and has attained *de facto* statehood, the case for self-determination and secession is a very strong one and may outweigh the argument of the territorial integrity of Iraq. The Kurds may just be one of the extreme cases that the Canadian Supreme Court refers to. The violent oppression of the Kurds that lasted many decades and Hussein's massive and grave violation of the economic, cultural and social rights through the genocide of the Anfal campaign indicate this.

As we have seen, the Kurdistan Region fulfills the criteria for statehood and self-determination. It is a *de facto* state. However, since recognition of a government may be *de facto* or *de jure,* the question arises whether there is also a *de jure* international recognition of the Kurdistan Region. Shaw notes:

> *'Recognition* de facto *implies that there is some doubt as to the long-term viability of the government in question. Recognition* de jure *usually follows where the recognising state accepts that the effective control displayed by the government is permanent and firmly rooted and that there are no legal reasons detracting from this, such as constitutional subservience to a foreign power.* De facto *recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by* de jure *recognition when the doubts are sufficiently overcome to extend formal acceptance.'*

Following Shaw's definition it becomes apparent that the Kurdistan Region has not yet reached a *de jure* recognition of its statehood. This is perhaps not surprising. A formal declaration of independent statehood has not been uttered yet and the Kurdistan Region is

[93] Shaw, *International Law*, 2014, p. 187.

constitutionally still subservient to the Republic of Iraq. Moreover, the current war of the Kurdistan Region against IS makes it difficult to assess the situation.

In the foregoing analysis of the status of the Kurdistan Region under international law, it becomes apparent that the Kurdistan Region does not fit the definition of a federal state. Neither can it be declared a (*de jure*) state. This seems to suggest that the Kurdistan Region has taken a form and shape that is not (yet) reflected in the categories laid down by the orthodox approach. As a consequence, the Kurdistan Region would be left out in the category-based approach, since it cannot be considered to belong to any of the categories carved out by the orthodox view. Consequently, with the impossibility of categorizing the entity of the Kurdistan Region using the category-based approach, it follows that the assessment whether and to what extent the Kurdistan Region holds international legal personality will be impossible as well. The beforehand identification of the entity's rights and obligations, which is inherent to the traditional category-based approach, is thus not possible in this case. We will examine in the following if the reality of the Kurdistan Region can be better captured by the capacity-based approach.

II.IV The Kurdistan Region and the Capacity-Based Approach

The capacity-based approach recognizes all actors that effectively participate in the international system as international legal persons. The international legal order is considered a process of authoritative decision-making where participation depends on factual power and where the subject-object dichotomy is abandoned.

Applying this approach to the case of the Kurdistan Region, one must first assess whether this entity is exercising the factual power in the international sphere to be able to assess whether it can be considered an international legal person. Contrary to the category-based approach, the capacity-based approach concentrates on what the factual reality is and draws conclusions about the international legal personality from this reality. The foregoing analysis of the Kurdistan Region indicates that the region is indeed acting in the international sphere with considerable factual powers that range from cooperating with other countries in the fight against IS, as well as concluding contracts with foreign

states and multinational corporations. In other words, the Kurdistan Region has the capacity to enter into relations with other states and entities, and therefore can be consider to factually possess the capacities to act in the international legal system. Following the capacity-based approach this makes the Kurdistan Region a participant in the international legal order. By definition it follows that the Kurdistan Region must be an international legal person under the capacity-based approach.

In the previous part we established that under the category-based approach the Kurdistan Region fails to be categorized in the international legal system and as a consequence the extent of its international legal personality is impossible to determine. The capacity-based approach seems to capture the reality of the Kurdistan Region much better, qualifying the Kurdistan Region as a participant of the international legal system and therefore as an international legal person.

In the following we will examine how the normative-based approach qualifies the Kurdistan Region.

II.V The Kurdistan Region and the Normative-Based Approach

The normative-based approach rejects the traditional state theory. Also, in contrast to the capacity-based approach, it approaches the question of international legal personality normatively. In this normative-based approach, especially in the Kelsenian view of international legal personality, an entity can possess personality in various degrees. And if one acknowledges the general principles of law as an independent source of international law, state consent is not needed for individuals to hold international legal personality since in this perception, a general principle of law considers the individual the final subject of all law.[94] The individualistic conception put forward by Higgins furthermore presupposes that the state exists in order to protect the interest, welfare and freedom of the individuals that are part of it, the corollary of which is that there is no

[94] Lauterpacht, *International Law and Human Rights*, 1950, p. 9.

fundamental difference between the interest of the individual and that of the state.[95] It follows, that the Kurds inhabiting the Kurdistan Region, possess international legal personality. The Kurdistan Region, as the entity representing its Kurdish citizens and protecting their interests and welfare must therefore be considered to hold international legal personality as well.

This approach therefore does not emphasize the fact that the entity must be a state in order to be able to possess legal personality, but that any kind of theoretic vessel representing the individuals and their interests is an international legal person.[96] The Kurdistan Region as the vessel created by its inhabitants with the aim to follow and protect their own interests must therefore hold international legal personality in the normative-based view.

As we could observe, different approaches to the concept of international legal personality carry different consequences for the legal personality of the Kurdistan Region. In the following chapter, the concept of international legal personality will be normatively evaluated and the case study of the Kurdistan Region will be examined to determine what it can contribute to the debate of international legal personality.

[95] Higgins, *Problems and process*, 1994, p. 53.
[96] Lauterpacht & Lauterpacht, *International Law: Collected Papers*, 1975, p. 532.

PART III

The Legal Status of the Kurdistan Region of Northern Iraq and its Implications for the Concept of International Legal Personality

As could be observed in Part II, not all approaches to the concept of international legal personality succeed in providing answers to the question of the international legal status or personality of the Kurdistan Region.

In the category-based approach the gap between theory and practice becomes most apparent; the categories appear, simply put, outdated. In a post-colonial, ever-changing and globalized world it seems inevitable that new entities in all shapes and forms will arise. The notion of subject versus object, the idea that there is full international personality reserved only for states and that other entities may be granted international legal personality only if the vast majority of states in the international community decides to do so, ignore the fact that there are entities unrecognized as (full) international persons that nonetheless prove to be capable to act within the international realm in reality.[97] The Kurdistan Region confirms this latter reasoning, but it also shakes the whole view that the world order comes in a pre-fixed box of categories. In fact, the existing categories provide no space or fit for the Kurdistan Region in its current shape.

The Kurdistan Region experiences a lack of full sovereignty, at least legally speaking. The Kurdish Region still accepts its inferior status to Baghdad, the fact of being a federal state in a greater Iraq. However, the autonomy of the Kurdistan Region is not confined to the framework of the federation of Iraq, and is in fact heavily disrupting the boundaries that a federation provides for its federal units. The constitutional basis of the Kurdistan Region therefore does not reflect the reality, and it clashes strongly with the political and legal developments in the international realm. This gap between theory and practice is also palpable in the orthodox view of international legal personality. The Kurdistan Region, impossible to categorize, would be considered nonexistent in the

[97] See for example Kosovo and Palestine; Shaw, *International law*, 2014, pp. 171-174.

category-based view. Unsurprisingly, this does not make the Kurdistan Region disappear in reality. Even more so, the Kurdistan Region is interacting with the international community and as a consequence must have certain legal capacities in the international legal system.

A view of international legal personality that solely includes categories of international actors as they appeared up until the first half of the 20th century does not comprise the reality of the contemporary world. A category-based view aims at preserving a certain state of co-existence of international actors in a certain time, where power-structures are fixed and where there is no potential of development or change. It may contain a more or less subtle wish of powerful states to maintain their position in a certain world order. The application of the category-based approach to the case of the Kurdistan Region thus serves as an example how theory can clash with reality. The traditional doctrine of subjects is no longer sufficient to provide a satisfactory explanation of the complexities of an increasingly globalized world where a plethora of new political entities such as subnational governments like the Kurdistan Regional Government, multinational corporations and nongovernmental organizations in different forms have surfaced as new actors on the international stage. Thus, a deeper insight into the category-based approach of international legal personality and the case study of the Kurdistan Region show that the possession of international legal personality cannot be considered a *sine qua non* for the establishment of international legal relations, contrary to what the traditional view of personality may stipulate, it furthermore indicates that a reconceptualization of the subjects doctrine is necessary.

An approach that embraces the reality of the Kurdistan Region in the international legal sphere is the capacity-based approach. This approach can be deemed more viable in the contemporary age; by refraining from identifying international persons beforehand it avoids preset rules commanding the extent of the rights and duties of international persons. It is more pragmatic in its approach than the category-based view, since conclusions about the international legal personality are drawn from factual reality. It presupposes an observing eye that captures the developments and interactions in the international legal sphere, that acknowledges the great diversity of non-traditional entities

that contribute to the evolution of the international system and thereby never fails to stay in touch with the realities of the international legal order. While the capacity-based approach is pragmatic in its approach and more successful in embracing and explaining the reality of the contemporary international legal order, it fails to provide arguments as to *why* powerful states that are favored in a state-centric world view, would choose to abandon their powerful and exclusive position in favor of an approach that accepts the international legal personality of entities such as the Kurdistan Region and thus the *legitimate participation* of non-state actors by reason of their mere participation in the international legal system. In other words, why should states opt for a capacity-based approach when they can keep more powerful positions – at least in theory – in a world view that categorized the international sphere and where power hinges on the question of statehood and recognition? The choice for an alternative view of international legal personality can only be achieved through a shift in normative thinking, through a *preference* for a system that brings more justice.

The normative-based approach tackles the *why*. It advocates a different view of the world, a view that aims at protecting the interests, welfare and freedom of the individual, because this is believed to lead to a world with greater justice. As Higgins expresses, the state simply represents a theoretic vessel created by individuals with the aim to follow their own interests, the corollary of which is that there should be no fundamental difference between the interest of the state interest and the interest of the individual.[98] An international legal person has the right to legitimately participate in the international legal order, to carry rights and duties and to communicate the interest of the individual human being to the universal human society. The history of the Kurdistan Region serves as an example of how the voice of a people can be neglected, in fact ignored, even through genocide and even when their own state – Iraq - failed to protect them. It is therefore difficult to grasp why an entity such as the Kurdistan Region today, with a democratically chosen government, and which not only aims at but also substantially part succeeds in protecting the interests of its people, should be denied a

[98] Higgins, *Problems and process*, 1994, p. 54.

voice in the international legal sphere, if the world community hinges importance on human rights and a more just world.

By denying the Kurdistan Region ability to articulate itself *ergo* denying the individual human beings that inhabit the Kurdistan Region the right to be heard, the international community fails to respect the human rights of the Kurds. If we follow Nijman, the individual is 'the legal personality *par excellence* of international law' and has the natural right 'to be a subject of the rights to humanity'.[99] Nijman points out that if a state does not succeed in fulfilling its responsibilities vis-à-vis its citizens and as a consequence anarchy rules the nation, the international community has to listen to those who have been denied their basic rights.[100] Furthermore, Nijman uses the metaphor of *vocal cords* to describe a potential new function of international legal personality:

> *'International legal personality forms the cords between the individual human being and the universal human society, and because of it, the international community and international law must guarantee the right to have rights, the right to political participation, i.e., the rights to speak out and raise one's* voice.'[101]

A people like the Kurds have been not only muted but also been oppressed by the very states that they inhabit and which, instead of protecting them, have fought them relentlessly. If an entity such as the Kurdistan Region is denied the status of an international person, the individuals of this region also remain voiceless vis-à-vis the international community, they will never be able to raise their voice to the universal human society.

The case of the Kurds also serves as an example of how states as mediators or 'bridges' between the local, regional, and global levels often fail in protecting the interests of their very own populations. More than a hundred countries in the world have

[99]Nijman, *The concept of international legal personality,* 2004, p. 468.

[100] Ibid, p. 468.

[101] Ibid, p. 473.

non-democratic or just partly democratic governments, and the question arises whether such governments represent the interests of their populations or minorities rather than those of a small and powerful elite.[102] Thus the majority of individuals may never find an adequate vessel to express their needs and interests in the current state of affairs.

Interestingly, one could question if this individualistic normative approach stemming from Eurocentric legal scholars is representative of the rest of the world. However, in a world where the vast majority of countries are members of the UN, which Charter reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person',[103] and moreover where the International Covenant on Political and Civil Rights has 168 parties and 74 signatories,[104] it can be argued that the world already acknowledges its responsibility to protect humanity and to cherish:

> *'The ideal of free human beings enjoying civil and political freedom and freedom from fear (...) whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'*[105]

It may be the case therefore, that the world has already taken some steps in embracing a view that acknowledges the voice of the individual. However, a more outspoken acceptance of a normative-based approach of international legal personality would be an important sign of where we, as an international community, aim to go. In the light of the human rights developments and the willingness of the international community to speak up for human rights, it does not seem far-fetched to re-conceive the concept of international legal personality as a concept that is not only pragmatic but also idealistic, a concept that is in line with the developments and lessons of the past, namely to advocate human rights and to protect and value the voice of humanity.

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[102] Numbers retrieved from: www.nobelprize.org/educational/peace/democracy_map/production/index.html

[103] Preamble of the Charter of the United Nations [online]

[104] Numbers retrieved from: https://treaties.un.org

[105] Preamble of the International Covenant on Civil and Political Rights [online]

Conclusion

This thesis aimed to explore the question of the legal status of the Kurdistan Region and whether the entity of the Kurdistan Region in fact possesses international legal personality. From legal scholarship and practice three main approaches towards the concept of international legal personality were identified: the category-based approach, the capacity-based approach and the normative-based approach. In order to outline the different approaches the work of different scholars as well as the manifestations in legal practice were presented in the first part of the thesis. The second part connected the theoretical framework to the case of the Kurdistan Region and possible frictions between theory and reality were analyzed. The last part discussed the implication of this case study for the concept of legal personality.

The category-based approach dominated legal thinking until the second half of the 20th century. It aims at categorizing the international legal sphere and one of its characteristics is its state-centric *Weltanschauung*. Furthermore, in this view there is a foregoing assumption as to who can be qualified as an international legal person, with the general assumption that states are the only entities possessing full international personality and the only subjects of international law. However, after the end of World War II this view shifted somewhat and in the *Reparation for Injuries case* it was established that other entities could obtain international legal personality – at least to a certain extent – as well, if the international community in its entirety decides to recognize this.

The capacity-based approach implies a reversal of the traditional category-based view. McDougal, Higgins and Seyersted among others essentially put this new, more pragmatic view forward. This approach first examines who factually holds certain rights and duties in the international legal sphere, in other words, which actors participate in the authoritative decision-making process. This view refrains from the subject-object dichotomy, and redefines all those that effectively participate in the international legal

system as *participants,* and all participants are considered to be international legal persons.

Thirdly, the normative-based approach was discussed. This approach favors a view in which individuals are included as subjects under international law. Here, similar to the capacity-based approach, the traditional positivist view is reversed. Notably Savigny and Kelsen initiated the transition from the orthodox view on personality to a view that includes the individual. The state would acts as an intermediate between the individual and international interest. Lauterpacht and Higgins took the discussion to the next level, arguing that the international legal personality of individuals is in fact a general principle of law. Higgins even went further in suggesting that this principle even applies without the interference or an international law. The state is considered a theoretic vessel created by individuals with the aim to follow their own interests and in order to protect their welfare and freedom.

The second part of this thesis firstly analyzed the Kurdistan Region in the context of the Federal Republic of Iraq. The extensive autonomy of the region as well as its call for independence suggested that it is in fact much more than a federal state in the federation of Iraq. This analysis was sharpened in the following application of the category-based approach. To determine whether the Kurdistan Region belongs to any of the categories the traditional view presupposes, the questions of statehood and self-determination of the Kurdistan Region were tackled.

The Kurdistan Region fulfills most of the criteria of statehood, however it misses one important ingredient, which is independence. Even though factual independence may already be a reality, a formal statement of independence is still awaited. This may be achieved if the long anticipated referendum takes place and the Kurdish people decide in favor of independence and secession from Iraq. Moreover, it was crystallized that the Kurdistan region also met the criteria for self-determination. It was argued that when a group, such as the Kurdish people, falls victim to genocide and possesses a legitimate territorial claim and has attained *de facto* statehood, the case for self-determination and secession is a very strong one and may set aside the argument of the territorial integrity of Iraq. Still, a *de jure* recognition of the Kurdistan Region has not yet been reached,

perhaps unsurprisingly so, in the absence of a formal declaration of independence. This however also means that the Kurdistan Region does not fit the definition of a federal state, nor can it be declared an independent state. The suggestion followed that the Kurdistan Region in its current form cannot be categorized under the traditional category-based approach. If this approach were to be applied, the Kurdistan Region would be left out. A subsequent assessment of its international personality was therefore rendered impossible in this approach.

The reality of the Kurdistan Region could in fact be better captured by the capacity- as well as normative-based approaches. As an entity exercising factual power in the international sphere, the Kurdistan Region would be considered a participant and therefore an international legal person under the capacity-based approach. In the normative-based view individuals themselves possess international legal personality. Consequently, the entity representing them must possess it too. Thus the Kurdistan Region, as the entity that represents the interests and welfare of the individuals inhabiting its region, must possess international legal personality.

Thus, it depends on the approach chosen whether or not one comes to the conclusion that the Kurdistan Region possesses international legal personality. In the last part of this thesis a normative evaluation aimed at shedding light on what the Kurdistan Region may possibly contribute to the debate of the concept of international legal personality. It became clear that a view of international legal personality that only includes categories of international actors as they appeared up until the first half of the 20th century does not adequately grasp the reality of the contemporary world. The category-based view is considered to aim at preserving a certain state of co-existence of international actors of the world prior to World War II. It also presents the wish of powerful states to maintain their position in a certain world order – at least in theory, even if the gap between theory and reality cannot be denied. It is therefore deemed to be no longer sufficient in providing a satisfactory explanation of the complexities of an increasingly globalized world with new forms of political entities arising. The capacity-based approach on the other hand is considered to be more viable in the contemporary age, but the question arises *why* powerful actors such as states should opt for an approach

in which they lose their privileged position as the sole subjects of international law. The *why* was in fact only found to be answered with the help of the normative-based approach, since a shift in normative thinking is pre-supposed. Even more so, the international community must strongly pronounce a *preference* for an alternative view of international legal personality that dares to at least partially abandon the state-centric approach and in which the protection of the interests, welfare and freedom of individuals is pivotal. This can only be achieved if the world community acknowledges the international legal personality of entities such as the Kurdistan Region, who aim at protecting the interest of their citizens.

Denying these entities international personality means ignoring the voice of the human person that these entities represent and whose interests and welfare they protect. Therefore, this thesis pledges to re-conceive the concept of international legal personality as a not only pragmatic but also idealistic notion, for it can lead the way to an increasingly just international community that provides a stage where the voice of humanity can be heard.

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