

The Legal Status of the Kurdistan Regional Government (KRG) in International Law

Loqman Radpey¹

The University of Edinburgh, Edinburgh, Scotland

The Kurds in Iraq have always been suppressed by the governments ruling the country and have been through many hard stages over the past century. They have struggled for a state of their own but never fulfilled that dream. Kurds have experienced autonomous and independent states, but these did not survive. In the Treaty of Sèvres (1920), they had the right to self-determination, with independent statehood, but the treaty was never ratified. It was eventually replaced by the Treaty of Lausanne (1923), which made no mention of Kurdish statehood. Upon the invasion of U.S.-led forces into Iraq in 2003, the world turned its attention to the Middle East, and especially to the north of Iraq, Kurdistan. This region has been controlled by Kurds since the withdrawal of Saddam Hussein's forces in 1991. With the fall of Saddam Hussein's regime, there is a great opportunity to achieve their goal. Kurdish Parties have established the Kurdistan Regional Government (KRG), and the world has recognized it as a *de facto* state. To be a new nation-state in the international community and recognized as a *de jure* state under international law, it must meet various qualifications, some of which have already been satisfied by the KRG.

Key Words: International Human Rights; *de facto* statehood; Kurds; Kurdistan Regional Government; self-determination; Kurdish statehood.

1. Introduction

Throughout the centuries Kurds have struggled to control their own land. After centuries of cyclical oppression and autonomy, the Kurds of northern Iraq established a *de facto* state within a federal Iraqi state. Given the realities of the recent geopolitical situation as a direct result of the invasion of U.S.-led coalition forces in Iraq, as well

¹ LLM in Public International Law, the University of Edinburgh, School of Law, L.Radpey@ed.ac.uk.

as Turkey's attempt for EU accession, the world's attention has turned towards the Kurds in Iraq. Much has now been written on the subject in academic journals. This is a major change, as the situation of the Kurds has historically been under-investigated by most of the international community (Yildiz 2007). It paves the way to understand the Kurds and their role in achieving a stable peace in the Middle East. Not much has been written on the Kurds for many reasons, in particular the lack of available information concerning this people.

As the largest stateless nation in the world, the southern part of Kurdistan has a strong inclination to be an independent state in the region. Although Ismail Agha Simko's rebellion in the early 1920s was not a nationalist movement, it was the first serious attempt to establish an independent nation-state in the eastern part of Kurdistan (Yildiz 2004). The first and thus far only independent Kurdish state was the Kurdish republic, Mahabad (1945 to 1946). The current paper provides a brief history of "Kurdistan" and the "Kurds". The study aims to show the KRG's potential and what is required for it to become a new state in the world. It also investigates the situation of the Kurds as a whole and offers a description on how the situation has changed and the nature of these changes in the KRG as an emerging nation-state.

2. Where is the Kurdistan?

The term "Kurdistan" was first used in the twelfth century by Turkish Seljuk prince Saandjar when he established a province whose name coincides with the current Iranian province of Kurdistan (Yildiz 2004). "Kurdistan" means "the land of Kurds". According to Yildiz (Yildiz 2004), Kurdistan "has appeared on some maps since the sixteenth century," but the history of Kurdistan has been dominated by the activities and motives of various groups and states over the centuries, during which time it has not had a fixed territory (Yildiz 2004). The Sykes-Picot Agreement 1916 between Britain, France, and Russia divided Kurdistan according to Western interests (Yildiz 2005). The Kurds live in the landlocked mountains and high plateaus of the Zagros, Taurus, and Pontic mountains. Merhdad Izady says that:

'In contiguous Kurdistan, as well as in the many far-flung Kurdish settlements, mountains are the single most important natural phenomenon, and they have shaped the Kurdish history, people, tradition, and culture' (Izady 1999, 13). Kurdistan's land is divided between four sovereign states. It borders Turkey to the north, Armenia to the northeast, Iraq to the south and Iran to the east (figure 1)² (O'Shea 2004). Although Kurdistan has appeared on some maps since the sixteenth century, it is clear that it should be more than a geographical term as it also refers to a culture (McDowall, 1990)³. Most writers on Kurds have taken an anthropological approach and describe Kurdistan as just being the land or region inhabited by the Kurds (Stansfield 2003).

3. The Kurds

It should be borne in mind that the history of Kurdistan and the history of the Kurds are not necessarily the same thing (O'Shea 2004). In the seventh century C.E., the Arabs who Islamicized this part of the world named its people "Kurds" (Gunter 2009). Also some minorities live in Kurdistan including Christian groups, such as the Armenians, Assyrians, Turkomans, Turks, Arabs, and Iranians (Gunter 2009, xxix). The Kurds are an ancient Indo-European people, ethnically distinct from their Arab, Turkic, and Iranian neighbours (Anderson and Stansfield 2004), who came to the region about 4,000 years ago (Anderson and Stansfield 2004). They speak their own language (Kurdish, with several dialects) and despite the diversity of dialects they have a common and unique cultural tradition which is different from that of surrounding neighbours (Izady 1992). They are the largest stateless people in the world (Yildiz 2007), and are currently the third largest ethnic group in the Middle East (Yildiz 2005). They are descended from the *Medes* (a people mentioned in

² The first detailed map of Kurdistan's territory was published in 1947. O'Shea M T (2004) *'Trapped Between The Map and Reality: Geography and Perceptions of Kurdistan'* New York & London: Taylor & Francis or Routledge, at 151.

³ The Encyclopedia of Kurdistan, [Online] available: www.kurdistanica.com/english/geography/geography-frame.html.

the Old Testament of the Bible) (Yildiz 2005).

In addition, due to some political and also historical events, there are a lot of immigrant Kurds living in many parts of the world, especially in Lebanon (O'Shea 2004), Europe (Hassanpour 1996), the former Soviet Union (Kreyenbroek and Sperl 1992) and the United States (Kreyenbroek and Sperl 1992).⁴ Some statistics show that almost one million also inhabit the northeast province of Khorasan, Iran (Gunter 2009). Although there are no official population figures for Kurds, it has been accepted that they are the largest nation without a state in the world. Estimated figures indicate that the highest numbers of Kurds are to be found in Turkey (O'Shea 2004),⁵ but it is in Iraq that they constitute the largest proportion of the overall population (Yildiz 2004). Their population is between 24 and 30 million (Yildiz 2007), distributed through Turkey (14 million), Iraq (5 million), Iran (6.5 million), Syria (1.1 million), the Former Soviet Union (1 million), and at least 1 million living overseas in Europe, North America, and Australia (Anderson and Stansfield 2004). A large number of them live in the three biggest cities of Turkey: Istanbul, Ankara, and Izmir (Gunter 2009). Recent evidences show that their population has reached 35 million people (Anfal Case 2007)⁶.

It is clear that Southern Kurdistan in Iraq has a very special status since the creation of a *de facto* state in the Iraqi federation.

⁴ The Kurdish Diaspora in Europe and America is around 1 million. There are approximately 500,000 in Germany, 50,000 each in France, Sweden and the Netherlands, and 20,000 each in Britain, Switzerland and the US. (Kurdish Information Centre Annual Report 1995–96, London.)

⁵ The Kurdish population of Istanbul was estimated in 1990 as 2.5m. (Kendall, in *Current Position and Historical Background*, in Kreyenbroek and Allison 1994, p. 8), as compared to the whole population of Diyarbakir in 1996, which was 1.3m.

⁶ Special Verdict, Case No 1/ CSecond/2006, Al Anfal, Iraq High Tribunal, Second Criminal Court, at 38, 4 September 2007, [Online] available: www.law.case.edu/grotian-momentblog/Anfal/opinion.asp



Figure 1 - Kurdish Settlement in the Middle East (Britannica 2012)**

** Kurdish settlement, Encyclopedia Britannica. [Online] available: www.britannica.com/EBchecked/media/6304/Areas-of-Kurdish-settlement-in-Southwest-Asia [2013, January 28]

4. Southern Kurdistan And the Kurdistan Regional Government

The establishment of the KRG cannot be separated from the status of the relationship between the two main parties of Southern Kurdistan, the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK).

The Kurds in Iraq rose up under Sheikh Mahmud in 1922 and 1932, but the Royal Air Force (RAF) defeated them and Sheikh Mahmud was exiled to southern Iraq. In the early 1940s, Mola Mostafa Barzani set a local rebellion in the Barzan region. He was captured and exiled to Suleimaniyah, but escaped to Iran in 1943 (Yildiz 2004). The next Kurdish uprising (*Rapareen*), led by Mola Mostafa Barzani, began in March 1961 against the Iraqi government, but General Abd al-Karim Qassem's forces soon retook the areas (Stansfield 2003). The Kurdistan Democratic Party (KDP), formed in 1945 (Yildiz 2004), joined Barzani and at that time formed a special force known as *peshmerga* (literally meaning those who face death). Barzani then became president of this party in 1964. They continued to fight against the central government. On 8 February 1963, the coup against Qassem was instigated by a group of "Free Officers" who were members of the Ba'ath Party. At this stage, some assurances were given to the KDP regarding its autonomy (Stansfield 2003), but they did not involve Kurdish autonomy in any form.

Barzani had demanded a Kurdistan Regional Government (KRG), which was supposed to have authority over domestic affairs. But the Ba'athist regime became an "antagonist" toward the Kurds. Negotiations had no outcome, with the Kurds insisting on Kirkuk and Mosul's being in the Kurdish autonomous region. The Ba'ath regime began an 'Arabisation' policy which lasted until the fall of its sovereignty in 2003. President Abdul Salam Aref finally announced military operations against the Kurds on 10 June 1963. On 10 February 1964, a ceasefire was announced by the hostile parties and they reached an agreement without mentioning self-administration by the Kurdish region (Stansfield 2003).

The highest ranked members of the KDP opposed Barzani's action. They, and also some high commanders of *peshmarga*, were

expelled by Barzani (Stansfield 2003). Some say that these events are what resulted in the establishment of a new party called the Patriotic Union of Kurdistan (PUK) (Stansfield 2003). Barzani again demanded Aref allow autonomy. But its outcome was an offensive against the Kurds in March 1965. On February of 1966, a ceasefire agreement was announced by Barzani and the Iraqi government.

The weakness of the government led to a second coup d'état of the Ba'ath party on 17 July 1968 (Stansfield 2003). In December 1969, negotiations between Barzani and the Iraqi government began and the then vice president of Iraq, Saddam Hussein, travelled to Kurdistan to meet with Barzani, which led to the March Agreement (Stansfield 2003). President al-Bakr appointed five Kurds to his cabinet, including the Vice-President and Barzani. KDP members were appointed as governors of Suleimaniyah, Erbil⁷ and Dohuk. Schools, journals, and public bodies in Kurdistan began using the Kurdish language. There was an amnesty for all Kurds who fought against the Iraqi government (Yildiz 2004).

The peace did not last long. The GOI⁸ wanted to change the demographic status of the Kurdish area through Arabisation policies, especially in Kirkuk, which was an oil-rich city in Kurdistan. In September 1971, the GOI attempted to assassinate Barzani (Stansfield 2003). On 11 March 1974, Saddam Hussein announced his Autonomy Law in Kurdistan (Act No. 33 of 1974, which gave the governors' power to ministries in the central government and the President would have the ultimate authority over autonomous regions. Barzani and the KDP deny accepting it) (Yildiz 2004). War broke out by April 1974 and by June, the Iraqi army had taken Amadia, Aqra, Raniya, Rowanduz, and Qala Diza (Stansfield 2003).

On 6 March 1975, Saddam Hussein and the Shah of Iran formally settled all border disputes at the meeting of the Organization of Petroleum Exporting Countries (OPEC) in Algiers. In doing so, the Shah abandoned his support for Barzani in return for gaining sovereignty over half of the disputed region (Yildiz 2004). Barzani

⁷ Kurds call it Hewlêr (capital of Kurdistan Regional Government)

⁸ Government of Iraq

decided to end his revolution on 23 March 1975. Some officials, including Jalal Talabani, did not agree with this decision because he believed that Barzani could defeat the Iraqi army (Stansfield 2003). Iraqi forces killed thousands of Kurds, *peshmerga* and also civilians, as well as destroying roughly 1,500 villages. Thousands of Kurds sought refuge in Iran⁹ or surrendered to the Iraqi army (Yildiz 2004). The *Anfal*¹⁰ campaigns had been designed by Saddam to break resistance among the Kurdish population. Mass executions occurred. The Arabisation process was enforced, especially in Kirkuk, and Arabs settled in destroyed villages. KDP's leadership was passed to Barzani's son, Masoud.

Now, it was time for the leftist groups, coordinated by Jalal Talabani in Damascus, to become the principal organizations acting on behalf of the Kurds. On 1 June 1975, they formed the PUK (Stansfield 2003), aiming to organize the revolutionary forces of the Kurdish people (Patriotic Union of Kurdistan 1977). After moving to Iran in 1975, the KDP returned to Kurdistan on 26 May 1976 (Stansfield 2003). The KDP and PUK had a power struggle between 1976 and 1980, killing a lot of Kurds. This ended with the Hakkari massacre, in which three skilled commanders of PUK (Ali Askari, Dr Khalid Sa'id and Sheikh Yazdi) along with approximately 700 *peshmerga* were killed (Stansfield 2003).

On 22 September 1980, Saddam Hussein launched a full-scale offensive against Iran. Again, Kurds were victims of this war. It is estimated that perhaps as many as 100,000 Kurds were killed in 1988. Many men and teenagers, seized by the military, simply disappeared without a trace. The most important event was the use of chemical

⁹ Kurds in Iraq have always been welcomed by Kurds and government in Iran.

¹⁰ The term "Anfal" literally means the spoils (of war) which is the name of a sura, or verse, of the Koran that refers to the victory of the Prophet's followers over an army of unbelievers. and it was used by the Ba'athist regime as a code name referring to a series of offensive attacks against the Kurds in northern Iraq, in the spring and summer 1988. It is also known as the Kurdish Genocide, which was commanded by Ali Hassan al-Majid ('Chemical Ali'), secretary-general of the Ba'ath Party in Northern Iraq, including Kurdistan.

weapons at Halabja, a town close to the Iran's border where some 5,000 Kurds were killed on 16 March 1988¹¹.

In 1988, the main Kurdish parties established the first National Front of Kurdistan (Yildiz 2004) which was the origin of the Kurdistan Regional Government (KRG). The invasion of Kuwait by the forces of the GOI on 2 August 1990 prompted a reunification of the Kurdish national movement in Iraq. Academics have paid more attention to Southern Kurdistan after the events of 1990. After the Second Gulf War, a Kurdish area in northern Iraq was established under the control of two Kurdish parties (PUK and KDP) (Stansfield 2003), which was an indication of establishing a *de facto* state (Stansfield 2003). After the defeat of Saddam Hussein in Kuwait in late February, an uprising (*Rapareen*) occurred on 4 March 1990, which started in Raniyah, and Kurdish forces gained control of many Kurdish cities in the north, including Kirkuk on 20 March 1991 (Yildiz 2004). But it was short-lived. After the invasion of Kuwait and the defeat of Saddam's forces, Kurdish forces were forced out from northern Iraq by the Republican Guard, which retook Kirkuk on 28 March, and Suleimaniyah by 3 April 1991. Finally, Dohuk, Zakho, and Erbil were taken violently, with an unprecedented death toll of almost 20,000 Kurds and 100,000 missing (Yildiz 2004). Almost 2.5 million took refuge in the mountains bordering Iran and Turkey. Having better conditions in Iran, they moved there. It should be noted that the Kurdish uprising coincided with the Shiites' in the south of Iraq. This was, however, soon suppressed by a counteroffensive from the Republican Guard that quickly and savagely recaptured Basra, Najaf, and Karbala.

The UN Security Council passed Resolution 688 on 5 April 1990 in which, for the first time, Kurds were called by their name and their

¹¹ References describing the Anfal campaign: Human Rights Watch, *Human Rights in Iraq*, New Haven, CT: Yale University Press, 1990; *Genocide in Iraq: The Anfal Campaign Against the Kurds*, New York: Human Rights Watch, 1993; Middle East Watch Report, *Genocide in Iraq, 'First Anfal: The Siege of Sergalou and Bergalou, February 23–March 19 1988'*, [Online] available: www.hrw.org/reports/1993/iraqanfal/ANFAL3.htm.

suppression by the Iraqi government was condemned (Yildiz 2004). It was a milestone in the history of the Kurds. The Resolution demanded that Iraq end the suppression of its citizens, particularly in the south of Kurdistan. But it was not effective, even though humanitarian aid by international organisations to refugees was provided for by a Memorandum of Understanding signed on 18 April 1991 between the UN and the GOI (Yildiz 2004). In 1991, the U.S. and British government established No Fly Zones over a large part of northern and southern Iraq. Negotiations of Kurdish groups with the GOI failed in the summer of 1991.

On 20 October, Saddam's forces withdrew from the north (Erbil, Dohuk and Suleimaniyah). His government cut off the salaries of Kurdish workers and imposed an embargo on Kurdish movements (Yildiz 2004).

Kurdish parties withdrew from negotiations and held elections (National Assembly and presidential) on 19 May 1992, under the observation of human rights organizations, in which all Kurdish parties participated. Kurdistan was divided equally between the KDP and PUK (Stansfield 2003). It was one of the most democratic elections in the Middle East in which unprecedented numbers of people came out to vote (Stansfield 2003). It demonstrated the Kurds' understanding of democratic principles and their opposition to Saddam's regime. Christians received 5 seats in the new assembly (Yildiz 2004). It was a triumph for Kurdish democracy. Masoud Barzani and Jalal Talabani became political leaders, monitoring the activities of this *de facto* state, the Kurdistan Regional Government (KRG). On July 1992 and under Law No. 3 of 1992, its first cabinet was formed and Southern Kurdistan was divided into governorates (Stansfield 2003). Judicial power and a Supreme Court in KRG were established under Law No. 44, which was the 28 December 1992 Judicial Authority Law (Stansfield 2003).

After a while, embargoes by the United Nations and the Iraqi government caused political problems and their relationship became strained from September 1993. This resulted in armed conflict in May 1994 (Yildiz 2004). Meetings between leaders of the PUK and the

KDP in June resulted in the signing of the Paris Agreement in July with the presence of France, UK and U.S. representatives (Stansfield 2003). But it was broken by the KDP and fighting began again, as thousands of people were displaced. At that time, Suleimaniyah and Darbandikhan were under control of PUK and Erbil and Dohuk, KDP. This tension remained throughout 1995. The sanctions against Iraq imposed by the United Nations affected Southern Kurdistan, resulting in serious problems for the Iraqi nation as a whole. SC Res 986¹², passed on 14 April 1995 under Chapter VII of the UN Charter and its subsequent renewals, improved conditions in Kurdistan. It was supposed to be a “temporary measure to provide for the humanitarian needs of the Iraqi people, until the fulfilment by Iraq of the relevant Security Council resolutions, notably including resolution 687 of 3 April 1991”. This resolution noted the serious humanitarian situation in Iraq, allowing the oil sold by Iraq to finance humanitarian aid to the Iraqis. This became known as the Oil-for-Food Programme. In this programme, thirteen percent of revenue was given to the northern Kurdish-controlled region and was performed by UN agencies with the assistance of the local authorities in Kurdistan. By 30 August, a ceasefire agreement was close at hand with Robert Deutsch, a U.S. State Department representative in London. But by this time, the invasion of GOI and KDP forces in Erbil was underway by 2 a.m. GMT (5 a.m. in Kurdistan) (Stansfield 2003). The PDK retook Erbil and also Suleimaniya. The PUK retook Suleimaniyah through a counter-attack. Throughout 1996 and 1997, Western powers, including the U.S., were attempting to hold a ceasefire between the two parties. The PUK and KDP held the sixth round of talks in London in October 1997, but the KDP refused to share revenue and join a coalition government with the PUK.

¹² SC Res 986, 14 April 1995. [Online] available: www.un.org/Depts/oip/background/index.html.



Figure 2 - Kurdistan Regional Government Boundary

As a result of the 1996 round of fighting, the KDP took control of Erbil and Dohuk and Suleimaniyah. Parts of Erbil and Kirkuk remained under the control of the PUK (Stansfield 2003). Many people were displaced internally and very strict checkpoints were set up. In practice, southern Kurdistan was divided into two parts.

The KDP and PUK started peace talks in the winter of 1997. This time they wanted to end hostility. The U.S. government invited Barzani and Talabani to Washington, D.C. for talks, which resulted in the Washington Agreement of 17 September 1998 (Stansfield 2003). The agreement resulted in closer cooperation, the sharing of revenue, and the formation of an administration in Erbil as well as elections in which many parties participated to unify the Kurdistan National Assembly (KNA) and the Kurdistan Regional Government (KRG) (Stansfield 2003). Now, the power is balanced between two parties and a 50:50 system has been established in which KRG is ruling over the region (figure 2). Southern Kurdistan enjoyed a period of peace, political stability, economic growth, and international recognition throughout 1997 to 2002. Agencies of governments treat KRG as a *de facto* 'state' (Yildiz 2004), but no country recognizes it as a state.

Following the events of 9/11 and the calling of Iraq, Iran, and North Korea part of an 'axis of evil', U.S. and coalition forces attacked Iraq on 19 March 2003. Operation Iraqi Freedom was intended "to disarm Iraq of weapons of mass destruction, to end Saddam Hussein's support for terrorism, and to free the Iraqi people".¹³ Kurds had an important role in this war and it strengthened the relationship between the PDK and the PUK. During the early days of this war, *peshmerga* entered the cities of Kirkuk and Mosul. The political parties of Kurdistan signed the historic Unification Agreement on 21 January 2006 (Kurdistan Regional Government Unification Agreement 2006)¹⁴.

¹³ President declares beginning of operation Iraqi Freedom (22 March 2003), [Online] available: www.georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html. [2013, February 23]

¹⁴ Kurdistan Regional Government Unification Agreement, www.krg.org/articles/detail.asp?lngnr=12&smap=04030000&rnr=107&anr=8891

Compared to the suicide bomb attacks and other explosions in Baghdad and Sunni areas in the south of Iraq, Kurdistan remained relatively calm and peaceful¹⁵. This relative stability has allowed the Kurds to have the highest living standards, highest level of foreign investment ever and the highest level of security in the history of the Middle East and in Iraq, which has allowed them to engage in foreign relations with other countries. This has come at a considerable price. The total cost to the United States of the Iraq war is over \$3 trillion (Stiglitz and Bilmes 2010) and over 6,805 service members have died (Faces of the Fallen 2014)¹⁶.

Iraq's Constitution¹⁷ was approved by more than 78 percent of the 9.8 million voters in the October 15, 2005, referendum.¹⁸ It states that “The system of government is a democratic, federal, representative, parliamentary republic” (Con of Iraq, Art 1). Iraq remained a party to all the major human rights treaties.

Arabic and Kurdish were chosen as the official languages (Const. of Iraq, Art 4) and the Turkomen and Assyrian languages were also made official in the provinces where they are spoken (Const. of Iraq, Art 4(4)). Iraq was divided into 18 local provinces or “regions” (Const. of Iraq, Art.113); among them four are Kurdish (Erbil, Kirkuk, Suleimaniya and Halabja). The new Iraqi constitution recognized Iraqi Kurdistan as a federal entity within Iraq with “the structure of the regional government, its authorities and the

. [2013, November 18]

¹⁵Report to U. S. Congress on 7 March 2008, ‘Kurdish region remains the least violent region of Iraq.’ U.S. Dept of Defense, Measuring Stability and Security in Iraq, Report to Congress

¹⁶Faces of the Fallen, [Online] available: www.apps.washingtonpost.com/national/fallen/. [2014, March 12]

¹⁷Iraqi constitution 2005, [Online] available at: www.washingtonpost.com/wpdyn/content/article/2005/10/12/AR2005101201450.html. [2013, August 29]

¹⁸“The Iraqi draft constitution has passed, according to final results released Tuesday by Iraqi election officials,” [Online] available at: www.cnn.com/2005/WORLD/meast/10/25/iraq.constitution/. [2013, August 30]

mechanisms of exercising these authorities, provided that it does not contradict with this Constitution” (Const. of Iraq, Art 116). Each region shall have the right “to amend the application of the national legislation within that region” (Const. of Iraq, Art 117(2)), if the region is not specifically under the national government. They can have offices in Iraq’s embassies and diplomatic missions. (Const. of Iraq, Art 117(4)). The constitution not only kept substantial Kurdish autonomy, but also included the Kurds’ insistence on “federalism” – *de facto* or formal creation of “regions”, each with its own regional government. Kurdistan Regional Government, the Kurdistan Region Presidency, and the Kurdistan Parliament are the Kurdistan region’s main institutions¹⁹. The Regional Government can have the right to establish internal security forces for the region including police, security forces (Const. of Iraq, Art 117(5)) and will have an “equitable share of the national revenues sufficient to discharge its responsibilities and duties” (Const. of Iraq, Art 117(3)).

A Kurd was elected president of Iraq for the first time in history when Jalal Talabani (head of PUK) was elected interim president by the National Assembly In 2005. On April 22, he was re-elected to a four-year term under new Constitution (Const. of Iraq, Art 67). On June 12, 2005, Masoud Barzani was named “President of Kurdistan” by the Kurdish regional assembly and was re-elected by the people of the Kurdistan Region in July, 2009²⁰. The Kurdish coalition government is composed of 22 ministries and four departments²¹ and is based in Erbil, the capital of the Kurdistan Region. The Kurdistan draft constitution was approved by the KRG on June 24, 2009 and the Kurdistan Parliament passed it on June 26, 2009; but it has to be voted on in a referendum before entering into force. As of late 2014, the referendum still has not been held. The provisions of the Kurdish

¹⁹ Kurdistan Regional Government, [Online] available: www.dfr.krg.org/p/p.aspx?p=88&l=12&s=030400&r=403. [2014, July 2]

²⁰ Kurdistan Region Presidency, [Online] available: www.dfr.krg.org/p/p.aspx?p=88&l=12&s=030400&r=403. [2014, May 10]

²¹ Structure of the KRG, eighth cabinet, [Online] available: www.krg.org [2014, May 10]

constitution cannot directly counter those of the Iraqi constitution (Const. of Iraq, Art 13(2)).

5. Self-Determination and Autonomy and Prospects for Statehood

Like the United States of America, where each state has its own constitution and autonomous government under the federal constitution, Kurdistan has its own constitution. Like them, The Kurdish regional constitution must exist within the framework of the Iraqi federal constitution. How far can the Kurds go along the road toward complete autonomy?

After U.S. forces' withdrawal from Iraq in 2010, the KRG has been violating the agreement with the central government to draft official rules for decision-making and wealth-sharing between regions before signing deals with foreign companies. The KRG has signed oil exploration deals without Baghdad's approval (Oppel 2007). The KRG relied on Professor James Crawford's legal opinion on agreements²² as an official opinion. Pursuant to this, the KRG believes that signing oil agreements does not need central government's permission. The KRG and central government have two different interpretations of the Iraq constitution. By using its power beyond the central government, KRG indirectly shows its independence from Baghdad although it has never showed or said it directly.)

Article 141 in the Iraqi constitution confirms the previously passed legislation of Kurdistan since 1992:

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

²² 'The Authority Kurdistan Regional Government over oil & Gas under the Constitution of Iraq' by James Crawford SC, FBA, LL.D. Whewell Professor of International Law, University of Cambridge. 29 January 2008: [Online] available: http://www.ekrg.org/files/pdf/Crawford_Opinion.pdf

(Const. of Iraq, Art 141).

In the preamble to the Kurdistan constitution, some words were used that either suggest that Kurdistan demands to be an independent state or that it seeks equality for all, using terms such as “our people” and “nation” (Preamble of the Constitution of the Kurdistan Region)²³. Article 1 of the Kurdistan constitution reflects the independence of the Kurdish region, stating that “....It is a democratic republic with a parliamentary political system that is based on political pluralism, the principle of separation of powers, and the peaceful transfer of power through direct, general, and periodic elections that use a secret ballot” (Const. of the KRG, Art 1). The Kurdistan region enters into agreements with foreign entities on non-Article 110 subjects,²⁴ and signs deals with foreign entities on Article 110 subjects if the federal government consents. KRG received three C-130 cargo planes from Bulgaria without permission from the central government (Londoño 2008). Article 9(B) of the Iraqi Constitution prohibits a militia beyond the Iraq armed forces (Const. of Iraq Art 9(B)), but Article 12 of the Kurdistan Constitution recognizes the

²³ Preamble of Constitution of the Kurdistan Region.

²⁴ The Article 110 subjects are. They are many as: First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy. Second: Formulating and executing national security policy, including establishing and managing armed forces to secure the protection and guarantee the security of Iraq’s borders and to defend Iraq. Third: Formulating fiscal and customs policy; issuing currency; regulating commercial policy across regional and governorate boundaries in Iraq; drawing up the national budget of the State; formulating monetary policy; and establishing and administering a central bank. Fourth: Regulating standards, weights, and measures. Fifth: Regulating issues of citizenship, naturalization, residency, and the right to apply for political asylum. Sixth: Regulating the policies of broadcast frequencies and mail. Seventh: Drawing up the general and investment budget bill. Eighth: Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions. Ninth: General population statistics and census.

peshmerga forces (Const. of the KRG Art 12). Again, this violation can be seen in Article 65(13) of the Kurdistan constitution on sending troops outside of the region. The border with Iran is guarded with *peshmerga* of PUK and the Turkish border with KDP forces. Such tensions are new to the Middle East. The Kurdistan Constitution Article 17 states that “land and public property” in the Region belong to the Kurdish people, not to the central government. Article 19(10) of the Kurdish region, on freedom of expression, does not accord with the federal constitution because its limitations do not appear in Article 38 of the federal constitution. The limitations are that:

“Every person shall have the right to freedom of expression. The freedom and diversity of the press and other media must be guaranteed. This right shall not apply to libel, infringement of others' rights, sacrilege, provocation to violence, or the incitement of hatred between the groups of the people of Kurdistan.” (Article 19(10) of the KRG)

The Kurdistan region shall have the power of granting asylum according to its constitution (Const. of the KRG Art 19(19)), but this is among the powers of the federal government (Const. of Iraq Art 107). There are some additional conflicts between the two constitutions. Although Article 110 of the Iraqi federal constitution grants primary authority to the federal government, Article 4(1) of Kurdistan Constitution gives Kurdish law more power, providing that “the constitution and laws of the Kurdistan Region are more sovereign and supreme than those passed by the Iraqi government” (Const. of the KRG Art 4(1)). How will this relationship remain? In such conditions, how will the Kurdish constitution legitimize the government in Erbil, while at the same time not contradict the current Iraqi Constitution?

In the Iraqi federal constitution, Article 140 points to areas formerly lying within Kurdistan, including Kirkuk (Const. of Iraq Art 140), but Article 140 has not yet come into force. According to this article, a referendum in Kirkuk and other disputed territories must be performed to determine the will of their citizens to stay within Arab control or KRG.

Interestingly, the Kurdish constitution in Article 6 recognizes Islam as the religion of the majority of the Kurdish people and Islamic Shari'a as a source of legislation (Const. of the KRG, Art 6). At the same time, Article 2 of the Iraqi federal constitution places Islam as the official religion of Iraq and a source of legislation (Const. of Iraq Art 2). Both provisions seem to be violated in practice. Islam is not being used as a source of legislation in Kurdistan when, for example, women's rights have been guaranteed such as equality with men, removing all forms of gender discrimination, and providing other civil and political rights covered by international treaties (Const. of the KRG Art 20). Both constitutions respect other religions (Christians, Yazedis, and Mandi Sabeans). This situation raises questions on the status of the KRG in international law. In Article 8 of the Kurdistan Constitution, the right of the Kurdish people to self-determination is invoked and reserves the right to leave the federation if the central government departs from the federal model. But it seems that the KRG itself seeks self-determination and autonomy.

5.1. Self-determination

The right to self-determination is one of the complicated issues in international law. It developed from two different sources, the U.S. and Europe, and has been concerned with freedom and democracy. The U.S. stress is more individualistic, and the European approach has a more cohesive form.

The right to self-determination is one of the most controversial norms of international law. According to Martti Koskenniemi, there are two forms of self-determination: a 'good' form, which appeals to democratic instincts; and a less benign form, which appeals to nationalistic, isolationist instincts (Koskenniemi 1994).

Self-determination has caused considerable change in the geopolitics of the world. Most new member states of the United Nations have exercised their right to self-determination and consequently statehood since the Second World War. This self-determination principle was not mentioned in the Covenant of the League of Nations (Crawford 2006). Woodrow Wilson in his "fourteen points" refers to self-determination as

“10- Self-determination should be allowed for all those living in Austria-Hungary.

11. Self-determination and guarantees of independence should be allowed for the Balkan states.” Also, Atlantic charter points to self-determination:

“Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government restored to those who have been forcibly deprived of them.”

The right to self-determination was legalized in the post-1945 world after the creation of the UN. Article 1 (2) of the UN Charter declares that one of the purposes of the UN is “To develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples”.

Human rights law and treaties support the principle of self-determination as an inherent and legal right. They give protection to the fundamental social, economic and political rights of individuals and minority and non-autonomous peoples.

Article 1 of the International Covenants on Human Rights 1966 states that:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (ICCPR 1966).

The General Assembly of the United Nations has tried to describe the self-determination principle. In the first step, resolution 545 (VI) (GA Res. 545 (VI) 1952) was passed to include the statement “All peoples shall have the right of self-determination” in the International Covenants on Human Rights. Resolution 637A (VII) in 1952 recommended that “the state member of the United Nations shall uphold the principle of self-determination of all peoples and nations” (GA Res. 637A (VII) 1952).

The Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States 1970

(Resolution 2625(XXV)) stated that every state has “the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples”. It demonstrates that this right is not limited to colonial situations. Peoples in non-colonial situations are entitled as of right to secession from the existing independent state, if they encounter serious human rights violations, including oppression, discrimination, or marginalisation in the state to which they belong. This right is repeated in Paragraph 2 of General Assembly Resolution 1514 of 14 December 1960, which emphasizes an immediate and unconditional end to colonialism in all its forms. It also recalled the important role of the United Nations in “assisting the movement for independence in Trust and Non-Self-Governing Territories”. In 1960 it adopted Resolution 1514(XV), which determined that a Non-Self-Governing Territory is a territory which is ‘geographically separate’ and ‘ethnically distinct’ from the country administering it. But the Colonial Declaration 1960 suggested that self-determination is not limited to colonial territories (Declaration on the Granting of Independence to Colonial Countries and Peoples). The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural rights (ICESCR) and also the Vienna Convention and Programme of Action reassert that “All peoples have the right of self-determination”. Therefore, most of the member-states of the UN have accepted the right of self-determination as a natural and legal right “applicable to all peoples”.

After Indonesia’s invasion of East Timor in 1975, a UN-supervised referendum was held in 1999, and East Timor was internationally recognized as a sovereign state in 2002 (UN Transitional Administration in East Timor 1999). The International Court of Justice (ICJ) has also ruled in favour of people demanding their rights of self-determination, especially in the *Case Concerning East Timor (Portugal v. Australia)* and *Palestinian Wall Advisory Opinion* and regarded it as a right *erga omnes* (i.e., towards all or

towards everyone)(ICJ *ad op*, 2004)²⁵.

A growing number of communities within existing states are attempting to establish a state of their own. To legitimize their claim, they refer to the right of self-determination of peoples. The right of self-determination is seen as a concept which could justify the separation of a part of the territory of an existing state for the purpose of establishing a new state. This is the source of the majority of conflicts within the international community. Questions arise from this: what is self-determination? When does an entity qualify as a state under international law?

Self-determination is the legal right of “distinct” groups of people to choose freely to which state they wish to belong and to pursue their economic, social and cultural development (Encyclopedia Britannica)²⁶.

The criterion of “distinct” has two elements: objective and subjective. Objective elements consist of “common racial background, ethnicity, language, religion, history and cultural heritage” and the subjective element means that the group perceives itself as a distinct “people” (Hadji 2009).

A special factor that strengthens the right to self-determination is *de facto* independence. When a group such as the Kurds has a valid territory, and has achieved *de facto* statehood, the self-determination is quite compelling.

In the case of Quebec, the Supreme Court of Canada held: ‘international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states’ (Bayefsky 2000). The Court also specified that there is ‘no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right

²⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*Request for advisory opinion*, at para 88. Erga Omnes. ICJ, 9 JULY 2004

²⁶ Definition of self-determination: [Online] available: www.britannica.com/EBchecked/topic/533380/self-determination.

of a 'people' to achieve a full measure of self-determination' (Bayefsky 2000). It is clear that courts do not equate self-determination with secession. Instead, it is viewed as a new possible "right" separate from self-determination. The Supreme Court of Canada in the case of *Reference Re Secession of Quebec* decided that the people of Quebec have no right to unilateral secession from Canada:

[A] right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within ... the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. (*Reference re Secession of Quebec* 1998)²⁷

But the Badinter Commission which assisted the EU in the case of the dissolution of Yugoslavia held that self-determination serves to 'safeguard human rights' (Badinter Commission No. 2). By virtue of that right, every individual may choose to belong to whatever ethnic, religious, or language community he or she wishes. This commission also stated that 'international law as it currently stands does not spell out all the implications of the right to self-determination' (Badinter Commission No. 2)²⁸

Here, we see another two types of self-determination: Internal self-determination and External self-determination. In the

²⁷ Supreme Court of Canada Reference re Secession of Quebec, 2 SCR. paragraph 217, 1998

²⁸ Badinter Commission, Opinion No. 2

International Conference of Experts on the ‘Implementation of Right to Self-Determination as a contribution to conflict prevention’²⁹, M. C van Walt van Praag and O. Seroo provided that:

By Internal self-determination is meant participatory democracy; ...the right of a particular group within the State to participate in decision making at the State level. Internal self-determination can also mean the right to exercise cultural, linguistic, religious or (territorial) political autonomy within the boundaries of the existing state. By external self-determination (described by some as ‘full self-determination’) is meant the right to decide on the political status of a people and its place in the International community in relation to other states including the right to separate from the existing states of which the group concerned is a part, and to set up a new independent state (Walt Praag and O. Seroo 2011).

So internal self-determination has something to do with federalism and local government and external self-determination means separation or secession. “The people” is entitled to both types. If the state does not afford internal self-determination, the people can claim a right to external self-determination.

There are some differences, here, between “the people” and “minorities.” These were expressed in Arbitration Commission of the European Conference on Yugoslavia Opinion No. 2 (1992). It dealt with the case of the Serbian population of Bosnia-Herzegovina, and provided:

people is to be understood in the sense of all the people of a given territory. Of course, all members of distinct minority groups are part of the people of the territory. In that sense they too as individuals are holders of the right of self-determination. But minorities as such do not have a right of self-determination. That means in effect that they have no right to secession, to independence or to join with comparable groups in other States (Harris 1998, 120).

Non-colonial situations that have led to secession include: the

²⁹ Held in Barcelona, November 1998

separation of East Pakistan from West Pakistan in 1971 to form Bangladesh; the dissolution of the former Union of Socialist Soviet Republics in 1991; the dissolution of the former Socialist Federal Republic of Yugoslavia in 1991; the dissolution of Czechoslovakia in 1993; the separation of Eritrea from Ethiopia in 1993; the secession of South Sudan from the Republic of Sudan in 2011.

5.2. Kurdish self-determination

In recent years, as many as 140 movements have demanded autonomy (Moris 1997). In the Treaty of Sèvres, Article 62 (signed between allied powers and Turkey in 1920), the Kurds' right to self-determination and consequently statehood was recognized. It called for "a scheme of local autonomy for the predominantly Kurdish areas" (Yildiz 2004). But it was not ratified, because Turkey did not accept it. It was replaced by the Treaty of Lausanne (1923), which made no mention of Kurdish statehood (Gunter 2008).

The People of Southern Kurdistan have a common language, religion, ethnicity, and culture, so they satisfy the objective elements of the "distinct" criterion for self-determination. These Kurds do not want to be part of Iraq, even though they have been part of it for many years. Instead, they perceive themselves wholly as the Kurd ethnic. They thereby satisfy the subjective element, too. Kurds in Iraq have a common flag and it flies throughout the Kurdish region. Just as interestingly, the Iraqi flag is rarely displayed. They freely express their culture and identity. They also have a national anthem. Since the failure of the Treaty of Lausanne to recognize an independent Kurdish state, the Kurds in Iraq have always fought to obtain an autonomous land.

It is entirely possible for a unilateral declaration of independence not to violate international law because it "constitutes the exercise of a right conferred by it" (ICJ Ad Op 2010). The main implication of the right to self-determination is the legal entitlement to statehood and the recognition by third states. We do not wish to negate what we said earlier about internal self-determination, which is right of every citizen to take part in the conduct of public affairs at any level (Shaw 2003). So, the critical issue is the support of other states rather than

the legality of the declaration of independence to make the claim practically viable. In the case of Kosovo, the ICJ did not regard the support of states. In the Quebec case, the Supreme Court of Canada provided that:

although there is no legal right, under the Constitution or at international law, to unilateral secession [...] this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession (Reference re Secession of Quebec 1998).

It seems that the Supreme Court wants to indicate that this act should be political and if the international community recognized such secession, it would be successful. Although the international community is very cautious on these occasions, ‘...The international system neither authorises nor condemns such attempts, but rather stands neutral. Secession, as such, therefore, is not contrary to international law’ (Shaw 1996).

The Declaration of independence along with other facts, such as a defined territory and permanent population, may result in the creation of a new state, immediately or over time. Recognition is an essential criterion of statehood. When a group seeks recognition as a new state, a legal question arises: whether it meets the international legal criteria of statehood or not.

Concerning the declaration of independence, the International Court of Justice has acknowledged that ‘...general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law’ (ICJ Ad Op 2010). In other words, international law is neutral about the declaration of independence made by Kosovo; and ICJ did not decide on the effectiveness of the declared independence. The court believes that addressing these questions is not necessary and provides that ‘The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”,

however, concern the right to separate from a State' (ICJ Ad Op 2010).

This shows that international law is not defined as to how to treat the independence declaration of non-state groups. International law, also, cannot oppose it based on the territorial integrity of the state without this affecting the right to self-determination (Moore 2003).

It is clear that the principle of territorial integrity of States is not an obstacle to the peoples who are entitled to the right to self-determination in international law. "Self determination" is not the same thing as "declaring statehood," about which international law is neutral. There should be a balance point between these two principles, as ICJ confirms that '[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation' (ICJ Ad Op 2010). Therefore, declarations of independence cannot be contrary to international law (Bayefsky 2000). Regarding Kosovo, the ICJ in the *Kosovo Advisory Opinion* points to different views about the right of secession, but does not deny the right's existence (Weller 2011).

If the State fails to provide people sufficient guarantees of protection for their development as a group, if the negotiations were deadlocked, as is the case of the KRG with the central government, it would be reasonable to consider secession as a last resort to guarantee their rights. This may lead to external self-determination and it may be exercised through secession. In modern international law, this must be exercised through a democratic process and also especially through the non-use of force (Peters 2011).

The Canadian Supreme Court does not deny the right to internal self-determination. It says '[w]hen a people is blocked from the meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession' (Reference re Secession of Quebec 1998). In other words, blocking the exercise of the right of self-determination internally is a pre-condition to

secession.

Speaking of Kosovo, Tim Garton Ash believes that ‘Kosovo is unique, and there will be more Kosovos’ (Garton 2008 *The Guardian*, quoted in Ker-Lindsay 2011, 3). His point is that the principle of self-determination should be analysed in specific cases. For several years after 1945, the right to self-determination was restricted to colonial states, and 22 new States were recognised before 1989 (Bayefsky 2000). For the first time, the right of self-determination outside the context of decolonisation was accepted in the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Ad Op 2004). As we have seen, the Court recognized it a right *erga omnes*.

It seems that in order to study the current method of exercising the right to self-determination, each specific case should be taken into account separately and this may be done beyond more or less restrictive doctrines. It does not have a predictable form.

5.3. *Kurdish statehood*

The Montevideo Convention of 1933, on the Rights and Duties of States, defined a “state” under international law. This Convention, Article 1, requires a state to possess these requirements: ‘(1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with the other states’ (Convention on Rights and Duties of States Art 1, 1933). The Kurds in Iraq qualify as a “state” according to all four requirements of the Montevideo Convention.

“A permanent population” is necessary for statehood. The Kurdistan region in Iraq is a permanent population of about 5.2 million people (KRG 2013). Recently KRG officials have announced its population has reached to over 8 million after the recapture of Kurdish disputed cities in clashes with the so called Islamic State of Iraq and Al-Sham (ISIS). There is no rule on nationality and minimum limit of population (Crawford 2006). Kurdistan’s population is more than enough to satisfy the first qualification of an entity as a state, since the United Nations has recognized countries with populations of less than 500,000, such as Malta 409,000, Iceland

with 323,000, the Maldives with 309,000, Andorra with 86,000, and Palau with 20,000 (UN *Demographic & Social Statistics*)³⁰.

The Kurdistan region has been recognized as a territory (Const. of Iraq Art. 4, 113, 137). Therefore it has met the second element of the Montevideo Convention. There is no rule claiming the minimum area or contiguity of the territory of a state (Crawford 2006).

An “effective government” in internal and external affairs on a certain territory is considered to be a main element to statehood. The government must claim authority over its territory. The Kurdistan region satisfies this element because it has a government (the KRG). This authority must exercise governmental functions. Iraq’s Constitution has recognized the Kurdish region and Baghdad has no control over it (Const. of Iraq Art. 4, 113, 137). The KRG controls the oil and water resources, determines the tax rates, and is responsible for security forces of *peshmerga* region. It is a democratic republic that has a parliamentary system (Const. of the KRG Art. 1) that is like the government of the United Kingdom. The Kurdistan National Assembly is the Kurdistan Region's democratically elected legislature and its members are elected for a term of four years by secret ballot in a general election (Const. of the KRG Art. 40, 42). General elections have been held six times since 1992. . The last parliamentary elections were held on 21 September 2013. “Anyone aged 18 or over who is a citizen of the Kurdistan Region and is on the electoral register is eligible to vote in a direct, universal and secret ballot”. Unlike the past rounds, the new parliament hosts a wide range of parties and political lists as: Kurdistan Democratic Party, Change List, Patriotic Union of Kurdistan, Islamic Union of Kurdistan, Islamic Brotherhood of Kurdistan, Islamic Movement, Communist Party (Freedom List), Kurdistan Communist Party. Also, Parliamentary seats reserved for minority groups: Turkoman Development List, Hewlêr Turkoman List, Turkoman Change and Reform List, Turkoman Movement List, Al-Rafidain List, Chaldean-Assyrian-Syriac Council, Abna Al-

³⁰ Demographic & Social Statistics [Online] available: unstats.un.org/unsd/demographic/ [2014, January 15]

Barwan Isan Mergoz Batros (KRG Parliament)³¹.

States already have the capacity to enter into relations with other states. The KRG is able to meet this requirement. It has established a Department of Foreign Relations in September 2006 and has appointed a person of ministerial rank for the Department (KRG Department of Foreign Relation).³² The minister conducts foreign policy independently of the central government. The KRG receives representatives of foreign governments. Members of the U.S. Congress (KRG 2008)³³ and also the U.S. Secretary of State, the U.K. Foreign Secretary, and the UK Defence Secretary have visited Kurdistan and held press conference with Masoud Barzani (KRG 2007)³⁴. Interestingly, the Iraqi flag is absent from press conferences. Instead, there is the Kurdish flag. This has a clear message: that the Kurdistan region is something more than a province of Iraq. Conducting foreign policy is a reserve for sovereign states, not for a province of a country. KRG also hosts many international offices (KRG Current International Offices)³⁵.

³¹ Kurdistan Regional Government, *The Kurdistan Parliament*, [Online]available:

www.krg.org/p/p.aspx?l=12&s=030000&r=319&p=229. [2014, January 15]

³² Kurdistan Regional Government, *The Department of Foreign Relation*, [Online] available:

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³³ Kurdistan Regional Government, *Gohmert sees progress first hand in Kurdistan Region*, (11 January, 2008) [Online] available:

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³⁴ Kurdistan Regional Government, *U.K. Foreign Secretary and President Barzani Discuss Closer Ties* (18 December, 2007) [Online] available:

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³⁵ Department of Foreign Relations, Kurdistan Regional Government,

6. Conclusion

The KRG currently has a *de facto* status, but it can convert this into a *de jure* state. Kurds in Iraq had the opportunity of having a state at the end of World War I taken from them with the demise of the Treaty of Sèvres. Having suffered many persecutions, massacres, genocide and *Anfal* over the years, the Kurds in Iraq have an opportunity to establish their own state within the territory of the KRG. As the legal documents such as the UN Charter, the ICCPR and ICSECR have mentioned, ‘All people have the rights of self-determination....’ The Kurds in Iraq do have the legal and inherent right to self-determination since as a “distinct” people they have a common linguistic, historical, and cultural background. They can secede, become independent from Iraq, achieve their political, economic and cultural development, and determine their political future. The KRG, also, has potentiality of statehood as it satisfies the four requirements of the Montevideo Convention of 1933.

We have seen that there are no explicit rules prohibiting declarations of independence and also no international treaties dealing with or clarifying how to use it legally. Actually, International law remains neutral once a non-state entity declares independence. This was especially true in Kosovo’s case. It cannot be considered legal or illegal because it is not regulated by international law. International law may deal with it if it is done by an illegal use of force or by breaching peremptory norms. In the light of the current state of international law, the legitimacy of independence depends on its special circumstances and also on the democratic way of declaring it by the people living in that entity.

International law deal with declarations of independence indirectly through recognition by third states. As in the other cases, the KRG will be encountered with this issue. It is not clear and cannot be predicted how its neighbours, Turkey, Iran and Syria, will react to the KRG’s declaration of independence. Will it be recognized by

Current International Offices in the Kurdistan Region [Online] available: www.dfr.krg.org/p/p.aspx?p=37&l=12&s=020100&r=363. [2014, May 18]

them? How will other UN states react to this situation? These are critical questions that will be posed if the KRG declares its independence from the central government. In a large demonstration last year, people asked the KRD to declare a Kurdish state. Currently, the KRG is engaged in a tough debate with the central government on oil contracts and on the distribution of the proceeds.

The Baghdad owes the Kurdistan Regional Government \$6 billion for the six months (since February 2014) it has not paid the Kurds its share of the Iraqi budget. Because of this, the Kurds decided to withdraw their representative from Maliki's government. The Maliki seemingly uses financial pressure as a point against Kurds, but the KRG continues to export oil barrel through Turkey. Exploiting oil reserves is key for the Kurds in declaring independence because their territory is landlocked. They hoped to increase their output of oil.

The new Shiite prime minister, Haidar Al-Abadi in Baghdad has agreed to pay the delayed budget. The new government was established in September 2014. Under pressure from the U.S., Kurds have participated in new governments, though stating that it will not be permanent (just for three months) if their conditions are not fulfilled. One of their conditions is paying those \$6 billion to the KRG. As they said, this is Baghdad's "last chance".

Kurdish leaders have left their oil fields to Western companies, to drill, and produce. They have said that the constitution gives them the right to explore and drill for oil unilaterally. The Iraqi government claimed that the Kurds export the oil illegally and has threatened to sue anyone buying Kurdish oil, and it has taken one case to the International Court of Arbitration in Paris. On the contrary, the KRG has loaded the legal opinion of James Crawford on the authority of Kurds on its official site as a valid opinion to show its legality for exporting oil. Recently, a court in Texas, America, in August ruled in favour of the Kurds.

Since 6 August 2014, the KRG has encountered the so called ISIS (Islamic State of Iraq and al-Sham) which made a huge invasion into the Kurds' territory. Peshmerga faced ISIS along the six-hundred-and-fifty-mile front. This caused delaying a declaration of

independence. ISIS was close to Hewlêr (Erbil), the capital city of the Kurdistan region and at first took control of Sinjar and Mexmour. They also committed Yazidis (Kurdish religious minority) “genocide” in Shangal in which many Yazidi Kurds were killed by ISIS and many of them, especially young children and women, sought refuge from the bloodshed in the mountains, starving to death. Soon the *peshmerga* retook Mexmour. This situation is both an opportunity and a risk for Kurds. As the Islamic State forces took control of the city of Mosul, Iraqi Army soldiers fled. The Kurds took advantage of the situation and acquired the huge land of disputed territory which Kurds had claimed before. Some of the Kurds, especially President Barzani, believed that Art. 140 of the Iraqi Constitution is “over”. Some Kurdish and foreign scholars claim that the climate for declaring independence is good. In July 2014, President Barzani asked the Kurdish parliament to make preparations for a referendum on self-rule, “The time has come to decide our fate, and we should not wait for other people to decide it for us”. Even US President Obama recently told *Times magazine* that the Kurdish government is “functional the way we would like to see.” The KRG and its forces, Kurdish Peshmerga fighters, have proved their capabilities in fighting against this extremist group. With air and ground support of US, UK, Germany and other Allies of the coalition against ISIS. Kurdish forces are “making history”. The KRG do not want to give back its newly acquired territories to Baghdad.

Although Kurds insist on declaring independence, the KRG has to consider all issues dealing with a declaration of independence. Kurds believed the referendum could happen in 2015 but currently their priority is to defeat ISIS to create an environment fit to hold it. (At the time of this writing, *peshmerga* is still fighting ISIS and has retaken many lost territories. Also, Kurds are fighting against ISIS in Kobanê, a strategic city for Kurds west of Kurdistan. YPG (Yekîneyên Parastina Gel, the People’s Protection units) and YPJ (Yekîneyên Parastina Jin, the women’s Protection units) have been defending the city against rebels for two months. The KRG is sending *peshmerga* with heavy weapons to Kobanê through Turkey. They have recaptured

many villages around Kobanê recently, but ISIS still has a heavy presence there).

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