KURDISTAN AFTER THE REFERENDUM OF SEPTEMBER 25, 2017: STATEHOOD, RECOGNITION, AND INTERNATIONAL LAW

Thomas D. Grant[*]

TABLE OF CONTENTS

I. INTRODUCTION 370

II. THE STATE IN THE INTERNATIONAL LAW SYSTEM 371

III. HOW INTERNATIONAL LAW TELLS WHETHER A STATE EXISTS 372

IV. RECOGNITION AND A KURDISH STATE: OBJECTIONS 375
- *A. Domestic Legality and Recognition* 377
- *B. Territorial Integrity of Neighboring States* 381
- *C. Territorial Integrity as a General Principle* 384
- *D. Other Concerns Under General International Law* 385
  - *1. Breaches of Peremptory Norms in the Creation of the State* 385
  - *2. Future Conduct of the New State as an International Legal Person* 387
- *E. Security Council Practice and Iraq* 387

V. EMERGENCE OF AN INDEPENDENT KURDISTAN: POSSIBLE JUSTIFICATIONS AND THEIR DIFFICULTIES 389
- *A. Conduct of the Referendum* 390
- *B. Good Faith Efforts to Negotiate a Settlement* 392
- *C. History of Repression Against Kurdistan* 393
- *D. Iraq's Constitutional Crises and Their Settlement: The Riposte to Secession* 396

VI. CONCLUSION 400

[*] Fellow, Lauterpacht Centre for International Law; Senior Research Fellow, Wolfson College, University of Cambridge. The author spoke on the subject of the present Article on May 25, 2017 in Erbil, Kurdistan, Iraq as part of the conference hosted by the University of Kurdistan Hewlèr and the Office of the Prime Minister of the Kurdish Regional Government (KRG) on *Iraqi Kurdistan at a Crossroads: Current Issues of Domestic and Middle Eastern Politics*. The writer thanks the University and the Office of the Prime Minister for their kind hospitality in May 2017. The views in this Article are the author's and do not necessarily reflect those of any institution or other individual.

I. INTRODUCTION

The Kurdish Regional Government of Iraq on September 25, 2017, held a referendum on independence. The following question was put to the electorate on the referendum ballot:

> "Do you want the Kurdistan region and the Kurdistani areas outside the region's administration to become an independent state?"[1]

The result was overwhelmingly in the affirmative.[2]

A referendum, without more, does not constitute a declaration of independence.[3] And a declaration of independence, without more, does not constitute a State.[4] However, the referendum of September 25, 2017, in Kurdistan[5] seemed to reflect an intention, shared by the government of the region and a large[6] part of its population, to proceed toward *de jure* separation from Iraq. The referendum, accordingly, occasions reflection on the difficulties that Kurdistan, if it came to assert independence as a State, likely would face in achieving international recognition.

---

[1] Michael Knights, *What is at Stake in Iraqi Kurdish Vote for Independence*, BBC (Sept. 18, 2017), http://www.bbc.co.uk/news/world-middle-east-41239673.

[2] A preliminary result as reported by the Kurdistan Regional Government (KRG) Cabinet was 92.73% in favor of independence. KRG Cabinet, *KHERC: Yes Wins by 92.73 Percent at Kurdistan Independence Referendum*, Kurdistan Regional Government (Sept. 28, 2017), http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=55861. The result is subject to approval by the KRG Court of Cassation. *Id*.

[3] Referendums typically are generally not binding; however, if they are binding, the measures that they approved are effectuated only after the passage of time, and their effectuation may require further steps, sometimes involving negotiation.

[4] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22) [hereinafter Kosovo Advisory Opinion]; *see also* Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Verbatim Record, 47 (Dec. 10, 2009, 10:00 AM), http://www.icj-cij.org/files/case-related/141/141-20091210-ORA-01-00-BI.pdf [hereinafter Kosovo Advisory Opinion Dec. 10 Verbatim Record] (James Crawford (for the U.K.) explaining, "A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping.").

[5] "Kurdistan" for purposes of art. 117, § 1, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005, refers to the federal region of Iraq comprised of the governorates of Duhok, Erbil, and Sulaymania. Whether Kurdistan for purposes of the referendum was quite the same thing is a matter fraught with difficulty, about which see below Part IV, Section *C* of this Article.

[6] Ninety-two percent of those casting ballots were reported to have voted in the affirmative. *Iraqi Kurds Defensively Back Independence in Referendum*, BBC (Sept. 27, 2017), http://www.bbc.com/news/world-middle-east-41419633.

The present piece is adapted from remarks that the author delivered at a conference hosted by the University of Kurdistan Hewlèr and Office of the Prime Minister of the Region in May 2017 and expands upon those remarks in view of subsequent developments. It starts with some considerations about the position of the State in the international law system (Part II) and the function of recognition in that system as a response to independence claims (Part III). It then turns to consider objections against recognition of an independent Kurdish State (Part IV), and it concludes with some considerations that might provide a response to the objectors but which also present fresh questions about the wisdom of a present move toward independence (Part V).

II. THE STATE IN THE INTERNATIONAL LAW SYSTEM

Necessary in any legal system is a mechanism to say who the subjects of the system are. That is to say, the system needs a way of identifying the entities that possess legal personality.[7] Legal personality is the capacity to hold rights and to owe obligations under the laws of a given legal system.[8] National legal systems recognize that individuals have legal personality. National legal systems also contain rules that identify certain organizations as legal persons. Companies, for example, are legal persons. A company, under national legal systems, is created in a manner specified in the laws of that system,[9] and the system contains mechanisms for recording the existence and identity of companies.[10]

Under international law, the main legal actor is the State.[11] The State acts through various organs and individuals.[12] It holds rights. It owes

---

[7] *See* Joanna J. Bryson, Mihailis E. Diamantis & Thomas D. Grant, *Of, for, and by the People: The Legal Lacuna of Synthetic Persons*, 25 ARTIFICIAL INTELLIGENCE L. 273, 277–80 (2017).

[8] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11). *See also* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29).

[9] *E.g.*, Canada Business Corporations Act, R.S.C. 1985, c C-44.

[10] *See, e.g.*, DEL. CODE ANN. tit. 8, § 106 (2016); Companies Act 2006, c. 46, § 9 (U.K.), http://www.legislation.gov.uk/ukpga/2006/46/section/9; *cf.* Amit M. Sachdeva, *Regulatory Competition in European Company Law*, 30 EUR. J.L. & ECON. 137–70 (2010); Lucian A. Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 56 J.L. & ECON. 383–425 (2003).

[11] OPPENHEIM'S INTERNATIONAL LAW 119–20, § 33 (Robert Y. Jennings & Arthur Watts eds., 9th ed. 1992) (The 10th edition of the treatise is forthcoming; the present author is the editor responsible for § 33). *See also* Reparation for Injuries Suffered in the Service of the United Nations, *supra* note 8.

obligations. It has independent capacity to enter into treaties and contracts in its own name. A State conducts its own affairs on the international plane, and it conducts its own affairs subject only to the general rules of international law[13] and any particular treaty rules that it has voluntarily accepted.[14] To put it another way, the State has full competence at the international level—the *fullest* competence that international law allows any entity to possess.[15] If there is any right or freedom that international law permits an actor to hold, then it permits the State to hold that right or freedom. It is in this sense that we sometimes identify the State as the central or main example of an international legal actor.[16]

III. HOW INTERNATIONAL LAW TELLS WHETHER A STATE EXISTS

Given how important States are to the international system, one might think that international law would have a well-developed procedure for determining when a State has come into existence. However, unlike domestic law, which has mechanisms that tell us when a company has come into existence, international law is much less systematic. International law contains no codified rules, no repository of records, and no *central* mechanism for determining when a State has been born.[17] International law certainly has no court with general competence to determine that question.[18]

---

[12] Responsibility of States for Internationally Wrongful Acts, Art. 4, Y.B. INT'L L. COMM'N 2001, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ARSIWA] (The Commentary to the Articles says as follows: This definition of a state organ "covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State . . . not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. . . . It does not matter for this purpose whether the territorial unit in question is a component unit of a federal State or a specific autonomous area. . . .").

[13] In particular those of an imprescriptible character—i.e., the *jus cogens* rules, for which *see* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422 (July 20), and ALEXANDER ORAKHELASHVILI, COLLECTIVE SECURITY (2011). As to non-recognition of situations arising from a breach of such rules, see *infra* note 71.

[14] S.S. "Lotus" (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept.7). *But see* Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71 (2007), *and* Kosovo Advisory Opinion, *supra* note 4, at 478, ¶ 3 (declaration by Judge Simma).

[15] *See* JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 45–62 (2d ed. 2007) ("[C]apacity [of the State] to enter into relations with other States." (quoting Convention on the Rights and Duties of States, Montevideo, Dec. 26, 1933, 165 L.N.T.S. 19)).

[16] OPPENHEIM'S INTERNATIONAL LAW, *supra* note 11, at 119–20, § 33.

[17] A proposal was put to the International Law Commission in 1996 to consider recognition as a topic of international law, but the topic was not added to the program of work. *See*

There do exist courts that deal particularly with international law.[19] But only in exceptional cases have courts dealt with the question of whether a State has been born. And, even in those cases, where the existence of a State has been a question, the question has been in the background of the case. It has seldom, if ever, been the main question. This was so in the Kosovo advisory proceedings at the International Court of Justice (ICJ), where the Court expressly did not decide whether there was a state of Kosovo, whether the emergence of such a state, as such, would accord with international law, or whether international law had anything to say about the lawfulness of recognition of Kosovo as a State.[20] The Supreme Court of Canada in its advisory opinion concerning Quebec took a different approach than the ICJ (as would be expected, as the questions that it was answering were different from that put to the ICJ); it addressed statehood and recognition more directly but still in the frame of other questions.[21] So too might it be said that *Dana Gas v. Kurdistan Regional Government*,[22] where the claimant sought to enforce an arbitration tribunal's order of provisional relief in English court,[23] involved a question of the emergence, if not of a new State, of a separate sovereign entity, but, like the other cases, the arbitration tribunal and the national court were not there for purposes of settling the question of whether a new sovereign had emerged. There is no court specifically empowered to deal with that question as a general matter when it arises, and few courts, when addressing related matters, have had much to say about it.

In court cases, we sometimes see *evidence* of the existence of a new State,[24] but court cases are not the main mechanism under international law for determining the existence of a State. The main mechanism for

---

CRAWFORD, *supra* note 15, app. 4 (containing the International Law Commission Planning Group's Outlines of Issues on the Topic of Statehood).

[18] Kosovo Advisory Opinion, *supra* note 4, at 423–24, ¶ 51.

[19] *See generally* Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT'L DISP. SETTLEMENT 241–77 (2011) (surveying how many and what types of international courts and tribunals exist presently).

[20] Kosovo Advisory Opinion, *supra* note 4, at 423–24, ¶ 51.

[21] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) [hereinafter Secession of Quebec].

[22] Pearl Petroleum Co. Ltd. v. Kurdistan Regional Government of Iraq, [2015] EWHC (Comm) 3361 (Eng.).

[23] *See id.* ¶¶ 4–12 (setting out the procedural history in the arbitration proceedings).

[24] And, sometimes, evidence that an old state, the independence of which was in doubt owing to arrangements of protectorate or the like, has maintained its sovereignty, at least for certain purposes. *E.g.*, Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176 (Aug. 27) (regarding French protectorate of Morocco); Drozd and Janousek v. France and Spain, 1992 Eur. Ct. H.R. 52 (regarding the legal relations of the Principality of Andorra).

determining that question under international law, instead, is *recognition*.[25] Recognition is a statement by an existing State that it is ready to accept the claim by another community to constitute a State.[26] Existing States recognize, or decline to recognize, a claim by a community to constitute a State.[27] For the most part, an existing State recognizes a new State individually or unilaterally.[28] A State may be mindful of how other States are responding, but it is still only exceptionally that States coordinate their recognition in any centralized or multilateral way.[29] There is no rule of international law telling them to use a particular procedure when they recognize a new State.[30] There is no rule of international law telling them to recognize a new State at all.[31] Recognition is, in large part, unregulated,[32]

---

[25] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 42 (1947) (explaining that to the "adherents of the declaratory doctrine . . . recognition signifies the acceptance of the new State as a member of the international community").

[26] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202 cmt. a (AM. LAW INST. 1987). *See also* CHRISTOPHER J. BORGEN & AZIZ T. SALIBA, SECOND (INTERIM) REPORT: RECOGNITION/NON-RECOGNITION IN INTERNATIONAL LAW 424–69 (2014).

[27] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 147–48 (8th ed. 2012). THOMAS D. GRANT, THE RECOGNITION OF STATES, at xix (1999).

[28] Ian Brownlie, *Recognition in Theory and Practice*, 53 BRIT. Y.B. INT'L L. 197–211 (1983); BORGEN & SALIBA, *supra* note 26; Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 609 (1941) ("The legal act of recognition is, as the establishment of a fact, a unilateral act.").

[29] *See* GRANT, *supra* note 27, at 149–213 (describing the coordinated approach on Yugoslav successor States); *see also* Written Statement of the United Kingdom, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Pleadings 93, ¶ 5.34 (Apr. 17, 2009) [hereinafter Written Statement of the U.K. in Kosovo Advisory Opinion] ("Collective non-recognition in these cases is a means of preventing the development and consolidation of situations which are unlawful under international law, including situations involving secession or otherwise affecting the status of territory.").

[30] The procedure of the European Community (EC) Arbitration Commission on Yugoslavia (Badinter Commission) was a purely *ad hoc* response by the EC states to the particular difficulties arising in Yugoslavia, but it approximated what a general collective mechanism for recognition might look like. Opinion No. 1, Conference on Yugoslavia Arbitration Commission, 92 I.L.R. 162, 162–208 (Nov. 29, 1991). See the detailed critique by Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BRIT. Y.B. INT'L L. 333 (1996), and the summary evaluation by Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178 (1992). *See also* Peter Radan, *The Badinter Arbitration Commission and the Partition of Yugoslavia*, 25 J. NATIONALISM AND ETHNICITY 537, 537–57; Michla Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence*, 20 MICH. J. INT'L L. 31 (1998). For further details about the Commission, see *infra* notes 123–125 and accompanying text.

[31] *Cf.* Opinion No. 10, Conference on Yugoslavia Arbitration Commission, 31 I.L.M. 1488, 1526 (July 4, 1992) (noting that recognition is "a discretionary act that other [S]tates may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law . . .").

and it is decentralized. However, whatever its gaps and deficiencies, recognition is as close as international law gets to an authoritative determination of whether a new State has come into existence.[33]

IV. RECOGNITION AND A KURDISH STATE: OBJECTIONS

What, then, should Kurdistan expect the reaction to be, if it declares independence and seeks recognition as a State? Objections to a declaration of independence are to be expected from a number of parties; few if any States would likely grant recognition in the aftermath of such a declaration. Among the parties and their concerns, the following merit particular consideration:

> *First*, there is the objection of Iraq.[34] Kurdistan today, as far as other States are concerned,[35] and as far as the constitution of

---

[32] LAUTERPACHT, *supra* note 25; Kelsen, *supra* note 28, at 605 ("[R]ecognition of a state or a government is an act which lies within the arbitrary decision of the recognizing state."); *id.* at 610 ("Existing states are only empowered—they are not obliged—to perform the act of recognition. Refusal to recognize the existence of a new state is no violation of general international law and thus constitutes no violation of the right of any other community.").

[33] While almost all States are members of the United Nations (and States are its only members), that was not always the case; membership in the U.N. historically has not been a perfect indicator of recognition or of statehood. Moreover, an entity that is undoubtedly a State could, for any number of reasons, still today remain outside the U.N.

It is also to be asked whether admission to the U.N. under Charter Art. 4 is a matter of general international law or, instead, an operation under the constitutional procedures of the organization. If it is viewed as the latter, as it seems it should be, then admission is at best only a proxy for a general international law mechanism of certification. The unique and diffuse practice of recognition retains its significance in this regard. *See* THOMAS D. GRANT, ADMISSION TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION 255–57 (2009); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 11, at 177, § 55. *Cf.* Jean Salmon, *Reconnaissance d'États*, 25 REV. BELGE DE DROIT INT'L 226, 226–27 (1992); Malgosia Fitzmaurice, Book Notes, 46 INT'L & COMP. L.Q. 976, 976–77 (1997) (reviewing A. JORI C. DUURSMA, FRAGMENTATION AND THE INTERNATIONAL RELATIONS OF MICRO-STATES. SELF-DETERMINATION AND STATEHOOD (1997).

[34] *Iraqi PM Urges Kurds to 'Cancel' Referendum Result*, BBC (Sept. 27, 2017), http://www.bbc.co.uk/news/world-middle-east-41413999. *Cf.* U.N. Secretary-General, *First Report of the Secretary-General Submitted Pursuant to Paragraph 6 of Resolution 2169*, ¶ 15, U.N. Doc. S/2014/774 (Oct. 31, 2014) (quoting the President of Iraq who "dismissed speculations of an imminent declaration of Kurdish independence as suggested in some earlier statements by Kurdish officials, saying that the Kurdish leadership had decided to remain part of Iraq . . .").

[35] *Current Foreign Representations in the Kurdistan Region*, KURDISTAN REGIONAL GOV'T, http://www.dfr.gov.krd/p/p.aspx?p=37&l=12&s=020100&r=363 (last visited Mar. 18, 2018) (listing consulate offices, consulates, and general consulates of twenty-four states located in Erbil, Kurdistan, Iraq. No country keeps an embassy in Kurdistan).

> Iraq is concerned,[36] is part of Iraq. It follows that the constitution of Iraq governs how people in Iraq—including the people in Kurdistan—might amend their constitutional relations, including how, if at all, they might lawfully dissolve those relations. Iraq will not lightly accede to such a dissolution.
>
> *Second*, there are Kurdistan's neighbors, Iran and Turkey. Iran and Turkey are likely to object.[37] They will say that the independence of Kurdistan increases the risk that Kurdish people in Iran and Turkey[38] will seek to separate from those countries.
>
> *Third*, the international community as a whole,[39] or at least some States in and beyond the region, have already made clear that the independence of Kurdistan would challenge the principle of territorial integrity—that is to say, it would derogate the territorial integrity of the particular State from which it might separate but also, through its example, would put at risk the territorial integrity of many States (As will be seen, there are important legal distinctions between the two).[40] States that have been the strongest and most consistent

---

[36] Arts. 109, 117, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 (describing unity, territorial integrity, and recognition of the Kurdistan region).

[37] Turkey's objections are well-known. As to Iran, see Arash Karami, *The Reason Tehran is Against Referendum on Iraqi Kurdistan*, AL-MONITOR (June 22, 2017), http://www.insideofiran.org/en/index.php/2016-08-19-08-24-13/2016-08-19-08-23-42/2143-the-reason-tehran-is-against-referendum-on-iraqi-kurdistan, *and* ALIREZA NADER ET AL., REGIONAL IMPLICATIONS OF AN INDEPENDENT KURDISTAN 101–32 (2016), https://www.rand.org/pubs/research_reports/RR1452.html.

[38] David Zucchino, *On Eve of Kurdish Independence Vote, a Warning From Turkey*, N.Y. TIMES (Sept. 23, 2017), https://www.nytimes.com/2017/09/23/world/middleeast/turkey-kurds-independence-referendum.html; Servet Mutlu, *Ethnic Kurds in Turkey: A Demographic Study*, 28 INT'L J. MIDDLE E. STUD. 517–41 (1996); DENISE NATALI, THE KURDS AND THE STATE: EVOLVING NATIONAL IDENTITY IN IRAQ, TURKEY, AND IRAN (2005); MICHAEL M. GUNTER, THE KURDS ASCENDING: THE EVOLVING SOLUTION TO THE KURDISH PROBLEM IN IRAQ AND TURKEY (2008); Martin van Bruinessen, *Kurds, Turks and the Alevi Revival in Turkey*, 200 MIDDLE E. REP. 7, 7–10 (1996); LOKMAN I. MEHO, THE KURDS AND KURDISTAN: A SELECTIVE AND ANNOTATED BIBLIOGRAPHY (1997).

[39] Meant in the sense that this expression appears in ARSIWA, *supra* note 12. *See also* Indo-Pakistan Western boundary (India v. Pak.), XVII R.I.A.A. 450 (Arb. Trib. 1968) ("One could add that stability and finality of all borders—if they do not contradict higher principles of International Law—is in the common interest of the whole international community.").

[40] A number of states asserted as much in regard to Kosovo's independence from Serbia. *See* Kosovo Advisory Opinion, *supra* note 4 (written statements of Cyprus, Spain, Russia and China).

> supporters of Kurdistan, in particular the United States[41] and United Kingdom,[42] have expressed particular concerns, including in respect to the impact that Kurdish independence would have on regional stability and on the campaign against ISIS.
>
> *Fourth*, questions might be asked both as to the legality of the conduct by which an independent Kurdistan emerged and as to the legality of the future conduct that could be expected from a State of Kurdistan in international relations.
>
> *Fifth*, the commitment of the U.N. Security Council to Iraq might be invoked as a guarantee of territorial integrity distinct from the rules of general international law.

Each of these objections merits consideration.

A. Domestic Legality and Recognition

As to the first, the objection that concerns the constitutional law of Iraq, the constitutional law of Iraq is not international law,[43] and international law

---

[41] *See* Michael R. Gordon, *Mattis Asks Iraqi Kurds to Put Off Vote on Independence*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/world/middleeast/iraq-kurds-independence-mattis-barzani-tillerson.html. On the day of the referendum, the U.S. Department of State adopted a press statement in which it indicated *inter alia* as follows:

> The United States is deeply disappointed that the Kurdistan Regional Government decided to conduct today a unilateral referendum on independence, including in areas outside of the Iraqi Kurdistan Region. The United States' historic relationship with the people of the Iraqi Kurdistan Region will not change in light of today's non-binding referendum, but we believe this step will increase instability and hardships for the Kurdistan region and its people. The unilateral referendum will greatly complicate the Kurdistan Regional Government's relationship with both the Government of Iraq and neighboring states. The fight against ISIS is not over, and extremist groups are seeking to exploit instability and discord. We believe all sides should engage constructively in a dialogue to improve the future of all Iraqis. The United States opposes violence and unilateral moves by any party to alter boundaries.

Press Release, Heather Nauert, U.S. Dep't of State Spokesperson (Sept. 25, 2017), https://www.state.gov/r/pa/prs/ps/2017/09/274419.htm.

[42] Noting the United Kingdom's cool response to initial proposals in Kurdistan for an independence referendum, see 584 Parl. Deb HC (2014) col. 173W (U.K.) (statement by Secretary of State for Foreign and Commonwealth Affairs).

[43] ARSIWA, *supra* note 12, art. 3 (Commentary to the article: "First, an act of a State cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation, even if it violates a provision of the State's own law. . . . An act of a State must be characterized as internationally wrongful if it constitutes a breach of an

as such does not impose a requirement of domestic legality on the creation of new States.[44] The *Quebec Reference*—the Canadian Supreme Court opinion—is sometimes invoked to mean that a declaration of independence must, as a matter of international law, be in accordance with national law.[45] But that is not precisely what the Supreme Court seems to have meant. The Court said that domestic legality is likely to be an important consideration when other States decide whether to recognize the new State:

> [A] failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the

---

international obligation, even if the act does not contravene the State's internal law—even if, under that law, the State was actually bound to act in that way.").

[44] Written Statement of the U.K. in Kosovo Advisory Opinion, *supra* note 29, ¶ 5.2 ("As a general matter, the domestic legality or illegality of an act does not determine whether it is in accordance with international law or is capable of producing effects under international law. International law is a distinct legal order with its own criteria of legality and validity and its own autonomous standards for determining the legal effects of conduct of public authorities."); Kosovo Advisory Opinion Dec. 10 Verbatim Record, *supra* note 4, at 46–54. *Cf.* MALCOLM N. SHAW, INTERNATIONAL LAW 218 (6th ed. 2008):

> There is, of course, no international legal duty to refrain from secession attempts: the situation remains subject to the domestic law. However, should such a secession prove successful in fact, then the concepts of recognition and the appropriate criteria of statehood would prove relevant and determinative as to the new situation.

[45] THE QUEBEC DECISION: PERSPECTIVES ON THE SUPREME COURT RULING ON SECESSION 44 (David Schneiderman ed., 1999):

> [T]he legality of the unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. . . . The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution.

See generally VENICE COMMISSION, SELF-DETERMINATION AND SECESSION IN CONSTITUTIONAL LAW (1999).

> perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.[46]

The court, in this passage from the advisory opinion, was concerned with an obligation to negotiate toward a new domestic constitutional settlement. The *legal* question that seemed to concern the court was "the legality of the acts of the parties to the negotiation process *under Canadian law*."[47] The question of international legality here was in the background. International legality was, perhaps, involved in respect of "the duty to undertake negotiations," but, there too, the consequence of a breach of the duty would not have been the unlawfulness of the act of secession under international law.[48] The consequence would have been reluctance of other States to recognize the secessionists' new State because "a failure of the duty . . . may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community."[49] It seems noteworthy, too, that the Court here invoked "legitimacy," not lawfulness.

Read closely, this passage of the *Quebec Reference* advisory opinion calls for caution, even if one accepts that the "claim to [domestic] legitimacy" is concerned not with legality of statehood as such but, rather, just with recognition.[50] To speak of a "precondition for recognition" is question-begging: recognition is a discretionary act, and the precise content of legal rules governing recognition are open questions. No doubt, if the existing State gives its consent to the independence of part of its territory, then that makes the road ahead for the new State much easier. The political dynamic of recognition will be much more favorable to the separatist entity where its separation is legal under the existing State's constitution. The Canadian Supreme Court seems here to have understood domestic legality (or "legitimacy") as relevant in this way. The court was, however, at best equivocal as to whether a requirement of domestic legality constrains the discretionary act of recognition under international law.[51]

---

[46] Secession of Quebec, *supra* note 21, ¶ 103.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Cf. id.* ¶ 155:

> Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation . . . this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be

Where a new State has emerged through lawful and consent-based procedures under the existing constitution, recognition by other States has come without much delay.[52] But, even then, recognition is not an automatic procedure. Domestic legality has had a facilitative effect; it does not in itself trigger recognition. Nor does domestic illegality preclude recognition. States whose independence violated the law of an existing State have gained independence and achieved universal recognition.[53] The main impact of the accordance or non-accordance of secession with domestic law is upon each State's appreciation of whether to recognize, an appreciation that remains as a matter of international law at the discretion of each State.

It is consonant with the *Quebec Reference* that other States have objected to independence referendums that take place without the consent of the incumbent State. That is to say, the response to (domestically) unlawful referendums tends to affirm the Canadian Supreme Court's understanding of the relevance of domestic law to the recognition of a new State. The General Assembly, when it condemned the referendum of March 2014 in the Crimean area of Ukraine, noted that the referendum was not in accordance with Ukrainian law.[54] The referendum was carried out in extreme haste, without *bona fide* observers, and in a situation of military emergency.[55] A

> dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition.

[52] The rate of international recognition of Montenegro, after it separated from Serbia in accord with the municipal legal procedures of the Serbia and Montenegro union, was five times that of Kosovo. As of September 25, 2017, Kosovo has been recognized by 113 countries, while Montenegro has been recognized by 187 countries. *International Recognitions of the Republic of Kosovo*, REPUBLIC OF KOSOVO MINISTRY OF FOREIGN AFFAIRS, http://www.mfa-ks.net/?page=2,224 (last visited Sept. 25, 2017).

[53] *See generally* SECESSION: INTERNATIONAL LAW PERSPECTIVES 374–415 (Marcelo G. Kohen ed., 2006) (addressing Latin American independence movements); THE ASHGATE RESEARCH COMPANION TO SECESSION 463–66 (Aleksandar Pavković & Peter Radan eds., 2011) (addressing independence of Bangladesh).

[54] G.A. Res. 68/262, at 2 ("Noting that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine."); Permanent Rep. of Ukraine to the U.N., Letter dated 15 Mar. 2014 from the Permanent Rep. of Ukraine to the United Nations Addressed to the President of the Security Council, U.N. Doc S/2014/193 (Mar. 17, 2014). *See generally* THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 15–20 (2015). At least one writer described the Crimea referendum as "at variance with international law." Otto Luchterhandt, *Der Anschluss der Krim an Russland aus Völkerrechtlicher Sicht*, 52 ARCHIV DES VÖLKERRECHTS 137, 159 (2014).

[55] Summary to the Decisions of the Constitutional Court of Ukraine dated March 14 and March 20, 2014, *Visnyk Konstytutsiynoho Suda Ukrainy*, in *Jurisprudence Étrangère*, 118 REV. GÉNÉRALE DE DROIT INT'L PUBLIC 982–84 (2014); *See also* Venice Comm., *Opinion on*

referendum such as that convinces nobody. By contrast, a well-organized, free and fair referendum is likely to attract less criticism. If it has the approval of the incumbent State, then it may be seen as an important step toward a new status. Even if the incumbent State objects to it, a referendum carried out on sound and verified procedures at least may diffuse the criticism. The so-called independence of Crimea however had many other problems—not least of these, the facts on the ground. Crimea was not independent.[56] It was under armed occupation having resulted from an unlawful use of force by another State.[57] These are international law violations *stricto sensu*. The domestic illegality of the referendum in Crimea thus was associated with other grounds of illegality presumably not present in Kurdistan. Domestic illegality, without more, does not necessarily preclude recognition.

B. Territorial Integrity of Neighboring States

Turning to the second objection—Iran and Turkey's objection about their Kurdish minorities—a number of points may be made. The situations in those two States are very different, but it is unlikely that either of them will be convinced that an independent Kurdistan is in its interest. Both will continue to view a new Kurdish State as a threat. From a lawyer's perspective, though, it is to be asked what if any legal effects such a threat (or perception of a threat) would have. Plainly, international law furnishes no basis to intervene against Kurdistan solely on grounds of an inchoate concern over stability. There is no right of preemptive intervention against an independence movement in another State. Even anticipatory self-defense, a doctrine with a more developed legal meaning (i.e., self-defense in situations where a threat is "instant, overwhelming, and leav[es] no choice of means, and no moment for deliberation"[58]), often entails difficult

---

"Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles," COUNCIL EUR. at 4 (Mar. 21, 2014), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)002-e; Press Release, Didier Burkhalter, Organization for Security and Co-operation in Europe, OSCE Chair Says Crimean Referendum in its Current Form is Illegal and Calls for Alternative Ways to Address the Crimean Issue (Mar. 11, 2014), http://www.osce.org/cio/116313.

[56] GRANT, *supra* note 54, at 15–20.

[57] Luchterhandt, *supra* note 54, at 160–61.

[58] As stated famously in the Webster-Ashburton correspondence of 1841–1842 in respect of the *Caroline*, for which see *British-American Diplomacy: The Caroline Case*, YALE L. SCH., http://avalon.law.yale.edu/19th_century/br-1842d.asp (last updated 2008). For a fresh reading of the correspondence, see Dino Kritsiotis, Professor, Nottingham Univ., Lauterpacht Centre

controversies over the facts. More expansive doctrines, such as preemptive or preventive self-defense, are controversial as a matter of international law.[59] To the extent that it has been posited that acts in self-defense are lawful on a preemptive or preventive basis, this has chiefly concerned the possible intervention against a State that it is feared may acquire a weapon of mass destruction (e.g., intervention to prevent acquisition and thus the possible future use of an atomic bomb). It has not concerned intervention to anticipate an irredentist threat against national territory.

Also relevant here is the general applicability of the rules of self-defense: the rules of self-defense do not significantly change as between use of force against a recognized State and against an unrecognized one.[60] Whatever the scope of preemptive or preventative doctrines, a State does not acquire a right to act in a territory simply by stating that it does not recognize a party's territorial claim.[61] Regardless of whether a State recognizes Kurdistan, the territory comprising Kurdistan remains subject to international law.[62] That

---

for International Law Sir Eli Lauterpacht Lecture 2017: A Return to the Caroline Correspondence, 1838–1842 (Oct. 13, 2017).

[59] *See* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 165–69 (Cambridge Univ. Press, 5th ed. 2012); Johannes Schwehm, *Präventive Selbstverteidigung. Eine vergleichende Analyse der völkerrechtlichen Debatte*, 46 ARCHIV DES VÖLKERRECHTS 368–406 (2008); W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006); Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 209–26 (2003); Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 89–103 (2003); KINGA TIBORI SZABÓ, ANTICIPATORY ACTION IN SELF-DEFENCE: ESSENCE AND LIMITS UNDER INTERNATIONAL LAW (2011); Sean D. Murphy, *The Doctrine of Preemptive Self-Defense*, 50 VILL. L. REV. 699 (2005); *see generally* PREEMPTION: MILITARY ACTION AND MORAL JUSTIFICATION (Henry Shue & David Rodin eds., 2007).

[60] It may be the case, however, that the application of the rules will differ in view of the differences in the facts as between those two situations.

[61] States remain obliged under general international law, and also under particular adopted rules such as those set down in provisional measures, in respect of zones (whether terrestrial or maritime) that are in dispute between States. *See* Request for Interpretation of the Judgment of 15 June 1962, Temple of Preah Vihear (Cambodia v. Thai.), 2011 I.C.J. Pleadings 1 (Apr. 28, 2011) (declaring a DMZ). *See also* Territorial and Maritime Dispute (Nic. v. Colom.), Judgment, 2012 I.C.J. Rep. 624 (Nov. 19); Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v. Côte d'Ivoire), Judgment (Sept. 23, 2017), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf. The taking of the position by a State that a particular area is under its sovereignty and not another's does not in itself entitle that State to attempt to effectuate its position by use of force. It is a supportable analogy to say that the declining of recognition by a State of a putative new State does not in itself entitle that State to use force in the territory claimed by the latter.

[62] *See* Otto Luchterhandt, *Der Krieg Aserbaidschans gegen Berg-Karabach im April 2016 aus völkerrechtlicher Sicht*, 55 ARCHIV DES VÖLKERRECHTS 185, 205–07, 219–20 (2017) (positing that Nagorno-Karabakh, though not recognized as a State, is a beneficiary of the

includes the rules of international law concerning use of force and self-defense.

But situations exist in which use of force is plainly justified as a matter of law. Use of force in response to an armed attack is the main example. A spectrum of situations may be described as an armed attack,[63] and assertions of a right of armed response almost inevitably entail disputes over the facts. Kurdistan, if it were to declare independence, would be subject to sharp scrutiny, in respect of any armed incident in Turkey or Iran regardless of origin, all the more so if the Kurdish minorities in those countries were involved. Turkey, concerned with Kurdish separatism in Turkey, in the recent past indeed has carried out military operations in the Kurdish part of Iraq.[64] Kurdistan, before a declaration of independence, would do well to give assurances to its neighbors.[65]

Confidence-building, as well as reliable channels of communication, are of vital importance to a newly independent State in a situation as delicate as Kurdistan would find itself. The countries of the region have faced extreme turmoil in recent years. Kurdistan's neighbors are justified in asking whether the breakup of Iraq would add to the turmoil. This is not because they necessarily have a right in respect of the preservation of Iraq; it is because they have a right in respect of the preservation of their own States. This is the reason that they well may ask what the authorities of Kurdistan meant when, on the referendum ballot, they invoked "the Kurdistani areas outside

---

international law prohibition against use of force). In Luchterhandt's view, for it to be otherwise would be tantamount to an "international law vacuum" (*völkerrechtliche Vakuum*). *Id.* at 207. This point follows as well, at least in a general way, from the observation that Western Sahara was not *terra nullius* before the arrival of the European colonial powers, a keystone finding in the case of Western Sahara, Advisory Opinion, 1975 I.C.J. 116–26 (Oct. 16) (separate opinion by Dillard, J.). Also relevant in this regard is the general objection to threats of force against Taiwan, a long-continuing (though unrecognized) separate entity. *See Chronique des faits internationaux,* 108 REV. GÉNÉRALE DE DROIT INT'L PUBLIC 180 (2004) (China's statement on use of force against Taiwan dated Nov. 19, 2004; and U.S. response dated Dec. 9, 2004).

[63] Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT'L L. 159, 159–210 (2014).

[64] The Turkish armed action in Iraq in February 2008 was of significant scale: Isabelle Moulier, *L'Emploi de la Force par la Turquie Contre le Parti des Travailleurs du Kurdistan (PKK) dans le Nord de l'Iraq*, 54 ANNUAIRE FRANÇAIS DE DROIT INT'L 143, 149–50 (2008). For Turkey's legal position, see *id.*

[65] For Kosovo's declarations, including in its submissions in the proceedings of I.C.J. see Accordance with International Law of the Unilateral Declaration of Independence by the Provincial Institutions of Self-Government of Kosovo, Verbatim Record, 14–29 (Dec. 1, 2009, 3:00 PM), http://www.icj-cij.org/files/case-related/141/141-20091201-ORA-02-00-BI.pdf.

the region's administration."[66] Such areas are found in Turkey, in Iran, and in Syria, as well as in other parts of Iraq. It would be imperative for an independent Kurdistan to give assurances that no policy exists for Kurdistan to foster the separation and merger of Kurdish areas abroad; those States would form their own judgments as to whether any assurances given are credible.[67]

C. Territorial Integrity as a General Principle

In respect of the third objection—the principle of territorial integrity—it is a strong objection from the standpoint of international relations; its strength as a matter of international law depends upon the situation in which it is invoked. General international law assures the integrity of States *across international borders*.[68] Thus as considered above (*infra* Part III.*B*), territorial integrity of a neighboring State after a Kurdish independent State emerges is a valid legal concern as against irredentist claims (if Kurdistan turns out to make such claims). That is to say, a State has an international law right to preserve its borders, and a new Kurdish State would have an obligation to respect borders.[69]

---

[66] Knights, *supra* note 1.

[67] An element in the common position of the European Community States in 1991, in respect of recognition of new States then emerging in the former Yugoslavia and USSR, was "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement." European Community: Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, Dec. 16, 1991, 31 I.L.M. 1485, 1487 (1992). Mutual recognition among the new States of the former Socialist Federal Republic of Yugoslavia (SFRY) included assurances of the finality of existing frontiers. General Framework Agreement for Peace in Bosnia and Herzegovina, art. X, Nov. 21, 1995, 25 I.L.M. 85, 90. Similar assurances were included in the transactions surrounding the independence of States in the USSR. Treaty Establishing the Commonwealth of Independent States, art. 5, Dec. 8, 1991, 31 I.L.M. 143, 144 (1992). At least one writer has suggested that the likelihood of success for a self-determination claim correlates to the favorability of the geopolitical context in which the claim is made. Marina Eudes, *Retour sur une réussite passée inaperçue: l'accord de Belfast et la nouvelle lecture du droit à l'autodétermination*, 110 REV. GÉNÉRALE DE DROIT INT'L PUB. 631, 641–45 (2006).

[68] *See* Kosovo Advisory Opinion, *supra* note 4, at 437, ¶ 80 ("[T]he scope of the principle of territorial integrity is confined to the sphere of relations between states."). *See also* Opinion No. 3, Conference on Yugoslavia Arbitration Commission, 31 I.L.M. 1499, 1500 (Jan. 11, 1992) ("According to a well-established principle of international law the alteration of existing frontiers or boundaries by force is not capable of producing any legal effect.").

[69] For these purposes, Iraq itself might well be regarded as a foreign State *vis* a new Kurdistan. Kurdistan at any rate would say that it is, that being the direct consequence of an independence claim—i.e., if Kurdistan became independent, then Iraq would become foreign to it. "Kurdistani areas outside the region's administration" then would seem to refer to areas in Iraq *qua* foreign State and thus, like "Kurdistani areas" in Turkey, Iran, and Syria, would involve the international law obligation of respect for territorial integrity.

As noted, however, international law does not concern constitutional changes within a given State. The creation of a new State inside the borders of Iraq is not, in itself, a step that general international law prohibits.[70] A genuine, indigenous movement in favor of separating Kurdish areas from, for example, Iran similarly would not in itself concern international law; however, if such a movement is active after Kurdish independence from Iraq, it is hard to imagine that the incumbent State (i.e., Iran in that case) would accept a characterization of the secessionist activity as purely internal. Any evidence that a new Kurdistan had been involved in the secessionist activity would almost certainly give rise to an international dispute of the most serious kind.

D. Other Concerns Under General International Law

Part III.*A* above has considered domestic legality and recognition of a future Kurdish State. Parts III.*B* and *C* have considered territorial integrity in the several settings where States are likely to invoke it under general international law. At least two further concerns may arise under general international law. Both relate to conduct of Kurdistan: first, in the process of its possible formation as a State, and second, in its anticipated future international legal relations as a State.

1. Breaches of Peremptory Norms in the Creation of the State

In a situation where it is claimed that a State exists but the basis of the putative State is inseparable from a breach of a peremptory rule of international law (*jus cogens*), the entity shall not be treated as a State. This is the rule of non-recognition embodied in Article 41 of the Articles on Responsibility of States for Internationally Wrongful Acts,[71] and it is a rule applied with a high degree of consistency, at least in respect of the situations

---

[70] *See* Kosovo Advisory Opinion, *supra* note 4; Secession of Quebec, *supra* note 21.

[71] ARSIWA, *supra* note 12, art. 41. Article 41 provides:

> Particular consequences of a serious breach of an obligation under this chapter
>
> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
>
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

Article 40 concerns "the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law." *Id.* art. 40(1). A breach for purposes of Article 40 is "serious" if "it involves a gross or systematic failure by the responsible State to fulfil the obligation." *Id.* art. 40(2).

that everybody agrees constitute the most serious violations of peremptory rules. Nobody recognized the South African "Homeland States" as States,[72] and nobody says that the "Islamic State" is a State for purposes of international law either.[73] These are entities whose existence is inseparable from "egregious violations of norms of international law"[74] and thus incapable of being accorded legal effects.

Non-recognition in response to such serious illegality is not, however, a system of general constitutional regulation. A breach of the national constitution, even a breach that results in the constitution's abrogation altogether, is not in itself a serious breach in the sense entailing the obligation of non-recognition. A breakup of Iraq resulting from the internal dynamics of that country, lamentable, even dangerous, as such a result might be, is not a violation of general international law. It is certainly not an international law violation to be equated to *Apartheid*, genocide, or the attempted acquisition of territory from other States by the unlawful use of force.

So an independent Kurdistan would meet serious objections, but, at least as objections under general international law, they are not entirely unanswerable (even as few of them have as yet been answered). This assumes that an independent Kurdistan, after the fact, did not open the door to the lawful use of force by a neighbor (or by any other State) in self-defense. Assuming that no ground was furnished for use of force against the separatists, and assuming that Kurdistan resolved any further legal objections (e.g., by avoiding other breaches, by extending appropriate assurances to its neighbors, etc.), there still would be no guarantee that the rest of the world would welcome an independent Kurdistan. Recognition, though a matter of international law, is also a matter subject to considerable discretion. The domestic illegality of a separation has cautioned against recognition. A Kurdistan that has emerged against the will of the incumbent State, Iraq, and that has done so in breach of Iraq's constitutional rules and in the absence of meaningful negotiation, would face serious difficulties in obtaining the recognition that is necessary for full participation in a range of international

---

[72] YAËL RONEN, TRANSITION FROM ILLEGAL REGIMES UNDER INTERNATIONAL LAW 50 (2011). *Cf.* Legal Consequences of the Construction of a Wall, Advisory Opinion, 2004 I.C.J. Rep. 136, 232, ¶ 43 (July 9) (separate opinion by Kooijmans, J.).

[73] As to genocide and the Islamic State, see Lars Berster & Björn Schiffbauer, *Völkermord im Nordirak? Die Handlungen der Terrorgruppe 'Islamischer Staat' und ihre völkerrechtlichen Implikationen* [Genocide in North Iraq? Acts of the 'Islamic State' Terrorist Group and Their Implications for International Law], 74 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 847, 847–72 (2014).

[74] Kosovo Advisory Opinion, *supra* note 4, at 437, ¶ 81 (regarding Rhodesia and Republika Srpska).

relations. The risk thus would arise that Kurdistan, though independent and a State, would exist in practical isolation.[75]

2. Future Conduct of the New State as an International Legal Person

General international law further may be concerned with the emergence of a new State because the new State will be a subject of international law, holding rights and obligations under it and entering into new undertakings with other similar subjects. As noted already, it is through recognition that international law responds to the claim that a new State has emerged. Existing States either recognize or decline to recognize a new State. The process of recognition is only loosely subject to legal rules. Yet recognition is not a purely political institution. As noted, considerations of legality affect the decisions of States whether to recognize. Among the considerations may be whether the new State will be reliable in the many transactions in which it is likely to engage as a person under international law. Expectations (or trepidations) about the new State's future international conduct well may affect decisions about whether to recognize such State.[76]

E. Security Council Practice and Iraq

The legal objections to an independent State of Kurdistan are not likely to be confined to objections under general international law. It is likely that the objections will invoke Security Council practice as well. The Security Council, as noted, has addressed Iraq to an unusual degree. To take one example, the Security Council, in Resolution 688 (1991) addressing repression of the Kurds, "*[r]eaffirm[ed]* the commitment of all Member States to respect the sovereignty, territorial integrity and political independence of Iraq and of all States in the region."[77] The Security Council was not agnostic about the territorial integrity of Iraq (nor has it since become so).[78]

---

[75] Closure of the civilian airports in the Kurdish region by the central government of Iraq shortly after the referendum and suggestions that the oil export pipeline too might be closed, suggest the seriousness of the risk. *See* Erika Solomon & Katrina Manson, *Iraq Closes Kurdish Airspace as it Raises Pressure on KRG*, FIN. TIMES (Sept. 29, 2017), https://www.ft.com/content/f65ab070-a513-11e7-9e4f-7f5e6a7c98a2; *Iran Says Ceased Trading Oil with Kurdish Region*, ASSOCIATED PRESS (Sept. 29, 2017).

[76] Consider in this regard the not-infrequent practice of securing a commitment from an emerging State that it will respect its international law obligations.

[77] S.C. Res. 688, preamble (Apr. 5, 1991) (emphasis in original).

[78] *See, e.g.*, S.C. Res. 2367, preamble (July 14, 2017).

While unusual, Iraq's case is not in all respects unique. The Security Council has addressed Cyprus, too. This was a significant consideration in the Kosovo advisory proceedings, where the wording of Security Council Resolution 1244 (1999)[79] was carefully studied for indications either of an intention to guarantee the indefinite unity of Serbia within the boundaries of that time (i.e., boundaries that included Kosovo) or of an absence of such intention. The International Court of Justice, in considering the matter, compared the Security Council's practice in respect of Kosovo to its practice in respect of Cyprus:

> Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channeling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.
>
> In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded" (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.
>
> By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.[80]

It is certainly open to Kurdistan to argue that the Security Council has addressed Iraq less like Cyprus and more like Serbia/Yugoslavia.[81] To "set out the specific conditions relating to the permanent status" of a State, as the

[79] S.C. Res. 1244 (June 10, 1999).
[80] Kosovo Advisory Opinion, *supra* note 4, at 449, ¶ 114.
[81] I.e., the incumbent State of which Kosovo at the time was part.

ICJ said the Security Council did in respect of Cyprus, is to lay down a directive in definite terms.[82] Such a directive, arguably, is more exacting than a "commitment . . . to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region," which are the words the Security Council used in Resolution 1244 (1999),[83] and which are similar to words it has used regarding Iraq.[84] Moreover, words such as those used regarding Serbia and Iraq suggest a guarantee against external threat, not an international disposition of the internal constitutional order of a State.

Nevertheless, Security Council practice almost inevitably would be invoked as a defense of Iraq's territorial integrity as against an attempted separation. Such defense would not be without substance. While the language concerning territorial integrity of Iraq in resolutions like Resolution 688 (1991) is bare-bones and plausibly interpreted as a statement of commitment of only a general kind and only in regard to integrity as against external threat, Security Council practice on Iraq has not been static. The Security Council, after the removal of the Ba'ath Party regime in 2003, took an active interest in the re-creation of the government and legal order of Iraq.[85] It was through the Council that an international law framework was established requiring the Coalition States in Iraq to take steps that otherwise would not be the normal (or permitted) activities of occupying powers, particularly the adoption of a new constitution and "the establishment of an internationally recognized, representative government of Iraq."[86] An even further-reaching resolution, reprising elements of the Security Council's practice on Cyprus, would be difficult for Kurdistan to answer.

These difficulties in view, it would be all the more important for Kurdistan to put forward affirmative justifications for its independence. Some possibilities may be considered, as well as the problems that these too present.

V. EMERGENCE OF AN INDEPENDENT KURDISTAN: POSSIBLE JUSTIFICATIONS AND THEIR DIFFICULTIES

As observed above, international law says little, if anything, to prevent changes in the domestic constitutional order of a State, including changes that result in the separation of territory from the State. It might therefore be

[82] Kosovo Advisory Opinion, *supra* note 4, at 449, ¶ 114.
[83] S.C. Res. 1244, preamble (June 10, 1999).
[84] *See supra* notes 76–77.
[85] *See* S.C. Res. 1483 (May 22, 2003); *see also* S.C. Res. 1500 (Aug. 14, 2003).
[86] S.C. Res. 1483, ¶¶ 8(c), 9, 20, 21, 22, 23(b) (May 22, 2003).

thought that a territory considering separation from the State of which it forms part need have little interest in articulating legal arguments to justify separation. Yet, as also considered above, the mechanism by which international law responds to the (putative) emergence of a new State is the decentralized mechanism of recognition. Individual States, considering when to recognize (if at all), retain a wide discretion in the matter but, as seen in modern practice, consider a range of legal factors. Legal argument, accordingly, for at least that reason has an important place in the emergence of a new State. Several matters in particular that arise in connection with Kurdistan's proposed independence entail legal questions and so call for legal argument in response.

A. Conduct of the Referendum

To start, there is the referendum of September 25, 2017. A referendum, carried out in an appropriate way, may be taken as a measure of the will of the inhabitants in a territory.[87] Any referendum should have taken into consideration the received international practice on the conduct of such procedures.[88] Fairness and transparency in this regard are important.[89]

---

[87] In the particular circumstances of a Non-Self-Governing Territory under U.N. Charter Chapter XI, heightened importance is attached to the "self-determination act." Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31–33 (Oct. 16); *see also* Rep. of the Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2001 on its Fifty-Sixth Session, U.N. Doc. A/56/23, at 62 (2001); S.C. Res. 2285 (Apr. 29, 2016); S.C. Res. 2351 (Apr. 28, 2017); CRAWFORD, *supra* note 15, at 620. As to the referendum in East Timor, see Gaël Abline, *De l'indépendance du Timor-Oriental*, 107 REV. GÉNÉRALE DE DROIT INT'L PUB. 349, 354–58 (2003). Use of a referendum as indicator of the will of the people may, by analogy, be applied to other situations.

[88] *See, e.g.*, Venice Comm., *Code of Good Practice on Referendums*, COUNCIL EUR. (Dec. 16, 2006), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2007)008-e; Venice Comm., *Referendums in Europe–An Analysis of the Legal Rules in European States*, COUNCIL EUR. (Oct. 20, 2005), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)034-e; Venice Comm., *Compilation of Venice Commission Opinions and Reports Concerning Referendums*, COUNCIL EUR. (Mar. 10, 2017), http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)001-e.

[89] *See, e.g.*, G.A. Res. 1608 (XV), ¶ 3 (Apr. 21, 1961); Northern Cameroons (Cam. v. U.K.), 1963 I.C.J. Rep. 15, 32–33 (Dec. 2) (leaving G.A. Res. 1608 (XV) (1961) undisturbed). *See also* İLKER GÖKHAN ŞEN, SOVEREIGNTY REFERENDUMS IN INTERNATIONAL AND CONSTITUTIONAL LAW 91–121 (2005) (ch. 5.4, "International Monitoring and Administration of Sovereignty Referendums."); Venice Commission, *supra* note 45; MARKKU SUKSI, BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM 235–68 (1993) (ch. 6, "The Referendum in the Context of International Law"). *See generally* YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994).

To say that a referendum's procedure was fair and transparent is not a complete defense of the referendum; a range of other questions are involved. Of particular importance, it will be asked whether the incumbent State consented to the referendum; if it did not, then domestic constitutionality well may be in doubt. *Ex post*, if the incumbent State maintains its objection, then this is a convincing sign that the referendum, from the standpoint of domestic law, is infirm; if the objection is expressed by the incumbent State's responsible judicial organs, that makes the objection all the more convincing as a measure of domestic constitutionality.[90] In that situation, other States will be very much discouraged from recognizing the result.

There are also preliminary questions concerning how the referendum is organized. The definition of the franchise is particularly important, because who has the right to vote may itself determine the outcome. Serious doubts will be expressed about a referendum where the relevant parties did not agree to the definition of the franchise,[91] or where for other reasons only certain segments of the population participated.[92] Organizers of the referendum also will have needed to put in place procedures for validating registration of persons eligible to vote. Rules concerning the conduct of pre-referendum

---

[90] *See, e.g.*, Judgement of the Constitutional Court of Ukraine on All-Crimean Referendum, Case No. 1-13/2014 (Mar. 14, 2014), http://mfa.gov.ua/en/news-feeds/foreign-offices-news/19573-rishennya-konstitucijnogo-sudu-v-ukrajini-shhodo-referendumu-v-krimu. Though in a very different factual setting, the referendum in Catalonia, eventually carried out on October 1, 2017, had been prohibited by decision of the Constitutional Court of Spain on September 7, 2017, a circumstance that no doubt would have a chilling effect on an attempt by a separated Catalonia to gain recognition. Fernando J. Pérez, *El Constitucional Suspende de Urgencia la ley del referéndum*, EL PAÍS (Sept. 8, 2017). As to an earlier Constitutional Court decision on reorganization of Catalonia's relationship with Spain, see Marc Weller, *Secession and Self-Determination in Western Europe: The Case of Catalonia*, EJIL: TALK! (Oct. 18, 2017), https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/. Weller was a member of an International Commission of Legal Experts constituted by the Catalonia government to furnish a Legal Opinion addressing the question of Catalonia. *See* Marc Weller et al., *The Question of Catalonia: The Will of the People and Statehood* (publication forthcoming).

[91] The long-running difficulties in Western Sahara over defining the franchise may be noted in this connection. *See* U.N. Secretary-General, *Report of the Secretary-General on the Situation Concerning Western Sahara*, ¶ 82, U.N. Doc. S/2017/307 (Apr. 10, 2017) (noting that Polisario, the Western Sahara independence movement, views the relevant electorate as "autochthonous population" of the territory, whereas the Kingdom of Morocco views the territory as integral to the Kingdom).

[92] One of the difficulties in Bosnia and Herzegovina, when the Badinter Commission rejected its first application for recognition, was the absence of a single referendum for the whole of the population. The Commission concluded that its advice not to recognize Bosnia and Herzegovina "could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all the citizens of [Bosnia and Herzegovina] without distinction, carried out under international supervision." Opinion No. 4, Conference on Yugoslavia Arbitration Commission, 31 I.L.M. 1501, 1503 (Jan. 11, 1992).

public discussion need to have been clear and enforced—and conducive to genuine debate over the referendum question. In Kurdistan, such matters should have been addressed with care before a referendum was held.

B. Good Faith Efforts to Negotiate a Settlement

Another legal question to be addressed is whether, in seeking an alternative to independence within the existing constitution of the State, the separatist party has acted in good faith.[93] The practice in respect of Kosovo indicates that this is a requirement, or at least a *desideratum*, of some importance. Kosovo did not declare independence out of the blue. Kosovo declared independence after negotiations.[94] The negotiations took place under various auspices.[95] They were intensive, and they ran for a considerable period of time.[96] By the time Kosovo declared independence, a

---

[93] It long has been understood that good faith is a principle of international law. Questions have been raised as to whether it has an existence autonomous from other rules, but there is no doubt that it operates among parties in the interpretation and application of other rules in force between them. *See, e.g.*, United Nations Convention on the Law of the Sea art. 300, Dec. 10, 1982, 1833 U.N.T.S. 397. As part of customary international law, see Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 18, 62, ¶ 128 (Apr. 20); Lake Lanoux Arbitration (Fr. v. Sp.) 12 R.I.A.A. 281, 308 ¶ 13 (Arb. Trib. 1957); Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at 28 (Apr. 4); Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser A/B) No. 64, at 19–20 (Apr. 6). *See also* Manfred Lachs, *Some Thoughts on the Role of Good Faith in International Law*, *in* DECLARATIONS ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 47 (Robert J. Akkerman et al. eds., 1977); Chagos Marine Protected Area Arbitration (Mauritius v. U.K.), PCA Case Repository ¶¶ 520–536 (Perm. Ct. Arb. 2015).

[94] Kosovo Advisory Opinion, *supra* note 4.

[95] MARC WELLER, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE FOR INDEPENDENCE (2009) (explaining in the Abstract: The "period [of the Kosovo crisis] saw the application of the entire arsenal of diplomatic tools available for crisis management, including good offices, negotiation, mediation through proximity talks and shuttle diplomacy, high-level conference diplomacy, action at the United Nations Security Council, and even the use of force.").

[96] *See* Martti Ahtisaari (Special Envoy of the Secretary-General), Rep. of the Special Envoy of the Secretary-General on Kosovo's Future Status, ¶¶ 1, 5, 7, U.N. Doc. S/2007/168 (Mar. 26, 2007) ("[A]fter more than one year of direct talks, bilateral negotiations and expert consultations, it has become clear to me that the parties are not able to reach an agreement on Kosovo's future status. . . . The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. . . . This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia—however notional such autonomy may be—is simply not tenable."); *see also* Written Statement of the U.K. in Kosovo Advisory Opinion, *supra*

wide range of observers agreed: negotiations had been exhausted.[97] The Canadian Supreme Court, earlier, had already suggested, as seen above, that "the obligation to negotiate" would play a role in how other States respond to a secessionist act. Kurdistan, of course, already has held negotiations with the central government over many issues.[98] Views differ from case to case as to how much is enough when it comes to negotiations and independence. There is no definite international law rule to tell how long is enough.[99] The point is simply this: States have looked more favorably on independence when independence follows good faith efforts at finding other solutions. The practice in this regard has a strong political or discretionary element; it nevertheless has a basis in legal principle.

C. History of Repression Against Kurdistan

Another area for legal consideration is the history of Kurdistan. This is a region that was on the international agenda from the beginning of the modern State of Iraq. Article 64 of the Treaty of Sèvres after World War One recognized the right of the Kurdish people to create a Kurdish State.[100] The

note 29, at 6, ¶ 0.8 ("the international community, acting through the Security Council, put in train a search for a better framework of relations between Serbia and Kosovo in Resolution 1244 (1999)," indicating S.C. Res. 1244 was not to be of an indefinite duration).

[97] Ahtisaari, *supra* note 96, ¶ 3.

[98] On the history of relations between the Kurdistan Regional Government and the central government, see MOHAMMED M.A. AHMED, IRAQI KURDS AND NATION-BUILDING (2012).

[99] For information about negotiations and duration in general Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections of the Russian Federation, 2009 I.C.J. Rep. X ¶¶ 1.12–1.13 (Dec. 1); Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 20 (Dec. 5); Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Order, 2017 I.C.J. (Apr. 19), http://www.icj-cij.org/en/case/166/orders.

[100] Treaty of Peace, U.K.-Turk., art. 64, at 21, Aug 10, 1920, T.S. No. 11, http://treaties.fco.gov.uk/docs/pdf/1920/ts0011.pdf ("If within one year from the coming into force of the present Treaty the Kurdish peoples within the areas defined in Article 62 shall address themselves to the Council of the League of Nations in such a manner as to show that a majority of the population of these areas desires independence from Turkey, and if the Council then considers that these peoples are capable of such independence and recommends that it should be granted to them, Turkey hereby agrees to execute such a recommendation, and to renounce all rights and title over these areas. The detailed provisions for such renunciation will form the subject of a separate agreement between the Principal Allied Powers and Turkey. If and when such renunciation takes place, no objection will be raised by the Principal Allied Powers to the voluntary adhesion to such an independent Kurdish State of the Kurds inhabiting that part of Kurdistan which has hitherto been included in the Mosul Vilayet."). Though superseded by the Treaty of Lausanne in July 24, 1923, which did not contain provisions for Kurdish independence, the Treaty of Sèvres remains noteworthy for its

Kurdish people today are the one people addressed in that way at that time who still do not have a separate State.[101] To observe that that is the case by no means settles the present-day problem. Most groups exercise self-determination by participating in a State with others, not by creating separate States.[102] The early treaty undertakings in regard to Kurdistan nevertheless illustrate that the problem is not a political construct of recent creation; that Kurdistan is an appropriate matter for international concern has long been recognized.

Turning to the more recent past, there is Security Council Resolution 688 of April 5, 1991.[103] In that resolution, the Security Council "[c]ondemn[ed] the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region."[104] It requested "the Secretary-General to pursue humanitarian efforts in Iraq" in respect of the "plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities."[105] The United States, United Kingdom, and France, with Resolution 688 in view, declared a no-fly zone in April 1991 covering the Kurdish region (i.e., Iraq north of the 36th parallel).[106] The violence and

declaration of a new territorial settlement in the Middle East, much of which has continued to this day. See Nick Danforth, *Forget Sykes-Picot. It's the Treaty of Sèvres that Explains the Modern Middle East*, FOREIGN POL'Y (Aug. 10, 2015), http://foreignpolicy.com/2015/08/10/sykes-picot-treaty-of-sevres-modern-turkey-middle-east-borders-turkey/. That said, it is the Treaty of Lausanne that States have invoked in respect of modern Iraq. *See, e.g.*, Prime Minister's Written Answer to a Parliamentary Question, 184 Parl. Deb. HC (5th ser.) (1991) col. 285 (U.K.).

[101] Note the emergence and admission of States to the United Nations, including Turkey, Syria, Lebanon, Iraq (original members, 1945), Israel (S.C. Res. 69 (Mar. 4, 1949)), Jordan (S.C. Res. 109 (Dec. 14, 1955)), and Armenia (S.C. Res. 735 (Jan. 29, 1992)). *See also* UNRECOGNIZED STATES AND SECESSION IN THE 21ST CENTURY 153–69 (Martin Riegl & Bohumil Doboš eds., 2017) (addressing "Kurdistan Region's Quest for Independent Statehood"); Isabelle Thomas, *Des Kurdes syriens*, 105 REV. GÉNÉRALE DE DROIT INT'L PUB. 742, 743 (2001).

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.& Herz. v. Yugoslavia)*, Preliminary Objections, 1996 I.C.J. Rep. 595, 739, ¶ 71) (July 11) (dissenting opinion by Kreća, J.).

[103] S.C. Res. 688, *supra* note 77, ¶¶ 1, 4.

[104] *Id.* ¶ 1.

[105] *Id.* ¶ 4.

[106] Another zone was established in August 1992 south of the 32nd parallel (i.e., covering Iraq's main Shia areas). *See* Select Committee on Defence, Thirteenth Report, 1999–2000, HC 453, ¶¶ 27–34 (U.K.) (regarding the humanitarian and legal bases for the zones).

oppression suffered by the Kurdish people in Iraq is thus a matter of record,[107] and it led to international action.

The appreciation by the Security Council of the repression of the Kurdish people is noteworthy because of the unusual degree to which it involved the Council in considering the conduct of a State within the State's territory. Individual States[108] and the Security Council[109] all were clear that Kurdistan was not to be recognized as an independent State.

The acknowledgment by the Security Council (and by other U.N. organs[110]) that the Kurds existed under severe repression nevertheless may be noteworthy as Kurdistan fashions a legal argument in support of its steps toward independence. Communities arguing for independence, including in the recent past, have asserted that an entitlement to independence arises when the conduct of the incumbent State toward a community has been egregious and good faith efforts to resolve the problem within the laws of the incumbent State have been exhausted. States take different views as to whether international law contains a "reparative" or "remedial" principle under which a community gains an entitlement to independence under such circumstances.[111] Only a handful of States take the position that it does.[112]

---

[107] Judy A. Gallant, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order*, 7 AM. U. INT'L L. REV. 881, 881–920 (1992); Peter Malanczuk, *The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War*, 2 EUR. J. INT'L L. 114 (1991) (for in-depth historical background); Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, 69 INT'L AFF. 429, 429–49 (1993) (discussing S.C. Res. 688 and the plight of the Kurds); AN ENCYCLOPEDIA OF WAR AND ETHICS 215 (Donald A. Wells ed., 1996) ("Resolution 688 broke new ground in international law, for the first time approving the right to interfere on humanitarian grounds in the hitherto sacrosanct internal affairs of member states." (internal citation omitted)); *see generally* HELENA COOK, THE SAFE HAVEN IN NORTHERN IRAQ: INTERNATIONAL RESPONSIBILITY FOR IRAQI KURDISTAN (1995).

[108] *E.g.*, the United Kingdom, see the Prime Minister's Written Answer to a Parliamentary Question, 184 Parl. Deb. HC (5th ser.) (1991) col. 285 (U.K.):

> The United Kingdom is a signatory to the treaty of Lausanne of 1923 which established the present-day frontiers in the region bounded by Iran, Iraq and Turkey. There can be no question of our seeking support for the establishment of a separate Kurdish state within these boundaries.

[109] *E.g.*, S.C. Res. 688, *supra* note 77, preamble (condemning the repression of Kurdish-populated areas in the resolution).

[110] *See, e.g.*, G.A. Res. 49/203, ¶ 8, Situation of Human Rights in Iraq (Dec. 23, 1994); Human Rights Council Res. 1994/74, ¶ 8 (Mar. 9, 1994).

[111] *See, e.g.*, Elizabeth Rodríguez-Santiago, *The Evolution of Self-Determination of Peoples in International Law*, *in* THE THEORY OF SELF-DETERMINATION 201–40 (Fernando R. Tesón ed., 2016); Heiko Krüger *Nagorno-Karabakh*, *in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 214, 220–22 (Christian Walter, Antje von Ungern-Sternberg & Kavus Abushov eds., 2014); Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 31–61 (1997).

[112] *See, e.g.*, Written Statement by the Swiss Confederation, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Pleadings 93,

The extreme difficulties faced by Kurds in Iraq would merit consideration by States. Except perhaps one or a small number of those States that have said that a remedial right to independence exists in international law, no State would consider that the difficulties in themselves entail a right to unilateral separation. Even those States that might ask whether attempts at a negotiated settlement have truly been exhausted. States inevitably would also note that the present government of Iraq is not the one that violently oppressed the Kurds. Whatever their earlier positions might have been, under present circumstances, States would certainly not accept that the Kurds have an international law right to use force against Iraq.[113]

D. Iraq's Constitutional Crises and Their Settlement: The Riposte to Secession

A final point concerns Iraq's constitution. The constitution, as a written instrument and as a set of practices, has the goal of providing public order in Iraq. It has not broadly succeeded in doing so in recent years. There is no doubt that Iraq is an international legal person and that its territory includes the Kurdish regions of Iraq. Iraq is a member of the United Nations.[114] Iraq has many treaties. Other States recognize Iraq.[115] However, if one looks at Iraq *as a domestic constitutional order*, the Kurdish Regional Government can pose serious questions. Three issues in particular would be relevant in legal argument in defense of independence—but, like the other considerations set out in this Article, these issues in themselves would not be decisive in persuading States to recognize an independent Kurdistan.

First, there is the failure of the constitutional mechanism for settling the boundary disputes among regions of Iraq. These include the dispute

¶¶ 57–68 (Apr. 17, 2009); Written Statement of the Kingdom of the Netherlands, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, I.C.J. Pleadings 93, ¶¶ 3.1–3.11 (Apr. 17, 2009). *See also* COUNCIL OF THE EUROPEAN UNION, REPORT: INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 17, ¶ 11 (2009).

[113] *See* COUNCIL OF THE EUROPEAN UNION, *supra* note 112, at 17, ¶ 11.

[114] Iraq is one of the original Member States of the U.N. in accordance with Art. 3 of the U.N. Charter.

[115] Including, without interruption, during the change of constitution after the intervention of 2003 and period of administration under the Coalition Provisional Authority (May 2003–June 2004). Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823–42 (discussing the rapid recognition of the new government and continuity between old and new Iraq). For a critical view, see Massimo Starita, *L'occupation de 'l'Iraq. Le Conseil de Securité, le droit de la guerre et le droit des peoples à disposer d'eux-mêmes*, 108 REV. GÉNÉRALE DE DROIT INT'L PUB. 883, 895–99, 895 n.16 (2004).

involving Kirkuk, an area of particular concern to the Kurdish region.[116] The boundary disputes are among the most serious problems of Iraq. The mechanism for their settlement thus was a vital part of the legal system of Iraq[117] adopted in the 2000s. The disputes, however, have not been settled, and it is unclear whether the settlement mechanism will ever settle them. Given the lapse of the time limit under Article 140 for referendums to determine the disposition of disputed areas,[118] it might be said that the constitution of Iraq, regarding this important problem, has failed.

A second question concerns fiscal relations and revenue-sharing. The fiscal and revenue laws of Iraq are complex.[119] Significant problems have arisen under the revenue-sharing provisions in particular. In federal States heavily dependent on revenue from natural resource extraction, such provisions are of fundamental importance. It may be said that the constitutional order has functioned effectively when it has settled disputes concerning revenue between the central government and its constituent territories;[120] it may be doubted whether it is functioning effectively when such disputes continue or worsen over time. The Kurdistan Regional

---

[116] The dispute escalated in the weeks before the referendum, *See* Erika Solomon, *Iraq Fires Kirkuk Governor in Kurdish Referendum Stand-off*, FIN. TIMES (Sept. 14, 2017), https://www.ft.com/content/709caa8a-9954-11e7-a652-cde3f882dd7b; *see also* Nahwi Saeed, *The Kurdish Referendum and the Status of Kirkuk*, WASH. INST.: FIKRA FORUM (July 5, 2017), http://www.washingtoninstitute.org/fikraforum/view/kurdistan-referendum-and-the-status-of-kirkuk. Boundary disputes in this part of Iraq are not new; the disposition of boundaries in northern Iraq has been a matter of vexation since the Ottoman State was liquidated and the Mandate entered into force. *See* Treaty of Lausanne, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, art. 3, ¶ 2 (Nov. 21).

[117] Comparable to this is the provision of the Dayton Accords on resolving the Brcko dispute. General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Yugoslavia annex 2, Dec. 14, 1995, 35 I.L.M. 111. *See also* Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area: Award in the Republika Srpska v. the Federation of Bosnia and Herzegovina (Control over the Brcko Corridor), 36 I.L.M. 396 (1997).

[118] Art. 140, § 2, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 ("The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to the executive authority elected in accordance with this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007.").

[119] *Id.*, art. 112.

[120] Consider the relative clarity achieved in Nigeria when a dispute arose as to whether it was the federal government or the governments of the states of the federation who hold jurisdiction over (and thus entitlement to revenues from) the maritime areas of Nigeria. Attorney-General of the Federation of Nigeria v. Attorney-General for Abia State [2002] 4 N.I.L.R. 5 (Nigeria).

Government and the central government of Iraq as of the time of the referendum had not settled their long-running differences on this matter.[121]

Finally, a question might be asked about the provision of security within the State. It is axiomatic that States exist to provide security.[122] Security is the original, arguably still the fundamental, function that a State is expected to serve. The rise and spread of ISIS confronted Iraq with a security threat of existential character. It was only with great difficulty and external support that Iraq turned the tide against ISIS. Kurdistan's forces, however, distinguished themselves as a fighting force (and not for the first time).[123] Kurdistan appeared in the early stages to be one of the most effective bulwarks against ISIS in the region.

The breakdown or disappearance of the central government of a State has been taken in modern practice to change the legal relations within that State to an extent that has consequences for international law. The consequences were visible in the early 1990s in the Socialist Federal Republic of Yugoslavia (SFRY). The European States, in response to the escalating crisis in the SFRY, set up a commission.[124] That Commission, led by the French jurist, Robert Badinter,[125] eventually concluded that Yugoslavia had ceased to exist.[126] The organs of government no longer functioned. The consequence was this: There remained no SFRY from which its constituent republics might secede, and, thus, the emergence of independent States in the former territory of the SFRY entailed no question of the rights of an

---

[121] Some of the complexities were explored in the High Court's judgment in Pearl Petroleum Co. Ltd. v. Kurdistan Regional Government of Iraq [2015] EWHC (Comm) 3361, ¶¶ 32–35 (Eng.).

[122] *See generally* MARTIN VAN CREVELD, THE RISE AND DECLINE OF THE STATE (1999); CHARLES TILLY, THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 42 (1975) ("War makes the state; and the state makes war.").

[123] *Profile: Who are the Peshmerga?*, BBC (Aug. 12, 2014), http://www.bbc.com/news/world-middle-east-28738975; *Why We Should Support Kurdistan's Peshmerga Army for a Safer Middle East*, KURDISTAN 24 (Sept. 21, 2017), http://www.telegraph.co.uk/news/world/kurdistan-independence-referendum/support-peshmerga-soldiers-for-safer-middle-east; IDRIS BUKAN, DER MUT DER VERZWEIFLUNG [VALOR OF THE DESPAIR: REPORT ON PESHMERGA] (2006); DENNIS P. CHAPMAN, SECURITY FORCES OF KURDISTAN REGIONAL GOVERNMENT (2011); Maximilian Popp, Christoph Reuter, & Jonathan Stock, *The Kurds' Lonely Fight Against Islamic State Terror*, SPIEGEL ONLINE (Oct. 29, 2014), http://www.spiegel.de/international/world/kurdish-fight-against-islamic-state-could-fundamentally-change-region-a-999538.html.

[124] Extraordinary Meeting of the Foreign Ministers Declaration of European Community Foreign Ministers on Yugoslavia (Brussels, Aug. 27, 1991).

[125] Badinter has been a legal academic, a lawyer, and a senator. He was French Minister for Justice from 1981 to 1986, during the presidency of François Mitterrand. From 1986 to 1995, he was the president of the Constitutional Council of France.

[126] Opinion No. 8, Conference on Yugoslavia Arbitration Commission, 92 I.L.R. 199, 202 (July 4, 1992) (the Commission stated, "that the process of dissolution of the SFRY referred to in Opinion No. 1 of 29 November 1991 is now complete and that the SFRY no longer exists").

incumbent State. Recognition of the new States ensued, and the effectiveness of their independence was, in time, secured, though not without great difficulty.

The situation today in Iraq is not to be equated with the disappearance of a State such as occurred with the SFRY. Strenuous objections would be made against any claim that Iraq has disappeared, and objections would come not only from Iraq itself. Present-day Iraq emerged from a long and enormously expensive undertaking by a coalition of States. The United States, in its statement concerning the September 25, 2017 referendum, was clear that it does not intend to promote Iraq's undoing: "The United States supports a united, federal, democratic and prosperous Iraq and will continue to seek opportunities to assist Iraqis to fulfill their aspirations within the framework of the constitution."[127] It would be surprising if any Coalition State were to accept the breakup of Iraq before a serious and long-term effort is made to preserve the State within its existing boundaries.

Yet the Kurdish Regional Government points to the deficiencies of Iraq when setting out a justification for a new State.[128] Progress toward a better functioning Iraqi federal system will, accordingly, support the riposte to Kurdistan that Iraq and Iraq's many supporters will advance.[129] As in other situations where separatist demands have arisen,[130] a serious effort at constitutional settlement within the existing borders will be expected before more radical solutions are entertained.

---

[127] Press Release, Heather Nauert, U.S. Dep't of State Spokesperson (Sept. 25, 2017), https://www.state.gov/r/pa/prs/ps/2017/09/274419.htm.

[128] *See* KRG Cabinet, *Report: The Constitutional Case for Kurdistan's Independence*, KURDISTAN REGIONAL GOV'T (Sept. 24, 2017), http://cabinet.gov.krd/a/d.aspx?s=040000&l=12&a=55856.

[129] As this Article went to press, the Kurdish Regional Government and the central government concluded a new agreement on certain fiscal matters (though not on the question of federal oil revenue sharing): Margaret Coker, *After Months of Acrimony, Baghdad Strikes Deal With Kurds*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/world/middleeast/iraq-kurds-agreement.html.

[130] And for Weller's views, see Weller et al., *supra* note 90. The almost universal non-recognition of the "Turkish Republic of Northern Cyprus" is instructive in this regard as well. The general international position has been that the division of Cyprus is to be resolved within the Republic of Cyprus through a negotiated constitutional settlement. CLAIRE PALLEY, AN INTERNATIONAL RELATIONS DEBACLE: THE U.N. SECRETARY-GENERAL'S MISSION OF GOOD OFFICES IN CYPRUS 1999–2004 (2005); António Guterres, U.N. Secretary-General, Rep. of the Secretary-General on His Mission of Good Offices in Cyprus, ¶ 1, U.N. Doc. S/2017/814 (Sept. 28, 2017). As to the Union of the Comoros, which from time to time appeared to be nearing dissolution, see Mita Manouvel, *Politique et Droit dans les resolutions de l'Assemblée Générale. La Question de l'Île de Mayotte*, 109 REV. GÉNÉRALE DE DROIT INT'L PUB. 643, 652–54 (2005).

VI. CONCLUSION

The Kurdish referendum of September 25, 2017 was at a time when diverse polities were taking a fresh look at their place in the world. The referendum on independence for Scotland (September 18, 2014) had rejected separation from the United Kingdom. A referendum in Catalonia (October 1, 2017) indicated support for separation from Spain. The referendum in the United Kingdom on membership in the European Union (June 23, 2016), while concerning the relation of one State to others and to the common institutions that they had established under treaties, not the integrity of a domestic constitution, attracted majority support for withdrawal. One might think that the referendum in Kurdistan is to be taken as part of a global trend.

However, as noteworthy as the political developments of recent years in the West might be, Kurdistan presents different considerations. The Kurdish Regional Government has functioned as an effective, and almost entirely separate, government in its territory for a considerable time. Whatever the significance of the sentiments favoring, e.g., Scottish or Catalan, independence, Kurdistan's experience with the incumbent State in recent times has been of a different kind. The Kurds in Iraq before 1991 suffered under one of the world's most violent and repressive regimes; from 1991 to 2003, they had relative (but not complete) security against that regime; after 2003, practical self-rule. Though co-habitation with the central government since 2003 has not been comfortable, it is hard to imagine a return to the abuses of the past. Yet that past is not a very distant one.

Also, unlike countries in the West in which referendums recently have taken place, Iraq in modern times has not had a smoothly-functioning parliamentary democracy or a diversified, modern economy. Kurdistan's misgivings about life in Iraq are grounded not only on a history of abuses; they spring as well from the dysfunctions of a republic that has struggled against a range of challenges.

The emergence of a new State of Kurdistan, however, would not be an easy solution. The present Article has considered one problem in particular that separation from Iraq would present. A new State, if it is to participate fully in international relations, will need to be regarded as a State by others. An unrecognized State does not exist in a total legal vacuum; it does experience significant difficulties. States in the region and beyond have been abundantly clear: They do not support the separation of Kurdistan from Iraq. As matters stand today, a declaration of independence would not be followed by widespread recognition of a Kurdish State. The objections to a Kurdish State have come from States with which Kurds have been in conflict; they also have come from the Kurds' strongest supporters. International law

gives no ready answer to the questions that Kurdistan and its government have raised. This, in part, owes to the reliance of international law on recognition, an institution retaining an essentially discretionary character, as the procedure by which it identifies its principal actors.