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The Case for Kurdish Statehood in Iraq

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THE CASE FOR KURDISH STATEHOOD IN IRAQ

*Philip S. Hadji**

This Note argues the legal and political case for a Kurdish state in Iraq. After some background on the Kurds, the Note begins by outlining the elements of self-determination and concludes that the Iraqi Kurds possess the right of self-determination. Next, the Note argues the Iraqi Kurds could secede from Iraq in a manner that gains international support and causes minimal disruption to the region through a process of “earned sovereignty.” Finally, the Note argues that American support of a Kurdish state in Iraq would benefit the United States. The newly formed state would be a secular democracy positioned in a strategically significant part of the world, could be a strong American ally, and would reaffirm the United States’ commitment to human rights.

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INTRODUCTION

Despite the calamity in Iraq since the United States invasion in 2003, there is hope in the Kurdish region of Northern Iraq. Compared to the rest of the country, violence in the Kurdish region has been relatively minor.¹ In many other parts of the country, by contrast, different ethnic groups living in close proximity to one another have engaged in high levels of sectarian violence.² At times, this violence was best described as civil war.³

The relative stability in the Kurdistan region has allowed the Iraqi Kurds to enjoy the country's highest living standard and highest level of foreign investment.⁴ Moreover, the region is stable enough to allow the Iraqi Kurds to engage in foreign relations with other countries and even host travelers and businessmen from Europe.⁵ While the level of day-to-day violence in Iraq has largely subsided since the invasion U.S. invasion, progress has come at a considerable price. Over four thousand American troops have died,⁶ and the total economic cost to the U.S. may easily reach

¹ In its report to Congress in March 2008, the U.S. Department of Defense noted the Kurdish region remains "the least violent region of Iraq." U.S. DEPT. OF DEFENSE, MEASURING STABILITY AND SECURITY IN IRAQ, REPORT TO CONGRESS 29 (Mar. 7, 2008). The Economist colorfully characterized the Kurdish region as "a haven of peace in a sea of turmoil." *Does Independence Beckon?*, ECONOMIST, Sept. 6, 2007, at 47.

² U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, PUBL'N NO. GAO-07-1197, SECURING, STABILIZING, AND REBUILDING IRAQ: IRAQI GOVERNMENT HAS NOT MET MOST LEGISLATIVE, SECURITY AND ECONOMIC BENCHMARKS 50-54 (2007).

³ See James D. Fearon, *Iraq's Civil War*, 86 FOREIGN AFF., Mar.-Apr. 2007, at 2-15; Nicholas Sambanis, Op-Ed., *It's Official: There Is Now a Civil War in Iraq*, N.Y. TIMES, Jul. 23, 2006, at D13 (defining civil wars as "armed conflicts between the government of a sovereign state and domestic political groups mounting effective resistance in relatively continuous fighting that causes high number of deaths").

⁴ Michael Rubin, American Enterprise Inst., *Is Iraqi Kurdistan a Good Ally?*, MIDDLE EASTERN OUTLOOK, Jan. 8, 2008, at 1, available at http://www.aei.org/docLib/20080107_22566MEO01Rubin_g.pdf.

⁵ *Id.*

⁶ Sam Dagher, *Helicopter Crash in Iraq Kills 4 Americans, in Biggest Toll Among G.I.'s Since September*, N.Y. TIMES, Jan. 27, 2009, at A14.

over two trillion dollars.⁷ More than two million Iraqis—almost ten percent of the prewar population—have fled to neighboring countries.⁸

The stability and autonomy that the Iraqi Kurds have enjoyed since the fall of Saddam Hussein in 2003 has presented the Iraqi Kurds with a tremendous opportunity. The Kurds have long dreamed of having their own sovereign state, and have suffered greatly as a result of not having their own state. Most notably, they were the victims of a genocide inflicted by Saddam Hussein, which took the lives of as many as 182,000 civilians.⁹ Given this unfortunate history, and their position as the largest ethnic group in the world without a country, the Iraqi Kurds have quite a compelling case for statehood.

This Note argues the legal and political case for a Kurdish state in Iraq. The first section provides background on the Kurds and Iraq. The second section outlines the elements of self-determination and considers whether the Iraqi Kurds possess the right of self-determination. The principle of self-determination is that distinct groups of people have the legal right to determine for themselves to what state they wish to belong.¹⁰ Given their common background, history, language, and culture, the Note concludes that the Iraqi Kurds qualify as a distinct group of people and therefore possess the legal right of self-determination.¹¹

The third section addresses whether the Iraqi Kurds could secede from Iraq in a manner that gains international support and causes minimal disruption to the region. The secession of Kosovo—through the process of “earned sovereignty”—demonstrates how a country can gradually secede from its parent state with minimal disruption. This Note argues that based on its success in Montenegro, Northern Ireland, and Kosovo—and the similarity between the religious and ethnic conflicts in these countries and Iraq—the “earned sovereignty” approach could be followed in the Kurdish region of Iraq to successfully execute a secession with broad support and minimal disruption.¹²

Finally, the Note examines the interests of the United States in the region. Ultimately, the legality of a Kurdish secession from Iraq will be judged by whether states choose to recognize the new country.¹³ Given that

⁷ Jamie Wilson, *Iraq War Could Cost U.S. Over \$2 Trillion, Says Nobel Prize-Winning Economist*, GUARDIAN (U.K.), Jan. 7, 2006, at 16.

⁸ Sudarsan Raghavan, *War in Iraq Propelling A Massive Migration*, WASH. POST, Feb. 4, 2007, at A18.

⁹ Human Rights Watch, *Genocide in Iraq: The Anfal Campaign Against the Kurds*, July 1993, <http://hrw.org/reports/1993/iraqanfal/ANFALPRE.htm> (last visited Apr. 18, 2009).

¹⁰ See *infra* notes 49–52 and accompanying text.

¹¹ See *infra* Part II.A–D.

¹² See *infra* Part III.C–D.

¹³ See *infra* Part III.E.

the United States has invested tremendous resources in the Iraq war and is a highly influential country, the support of the United States would greatly help the Iraqi Kurds. Supporting Kurdish statehood would be in the best interest of the United States.¹⁴ A Kurdish state would allow the United States to exit Iraq on a positive note by helping form a self-supporting, secular democracy. Moreover, the newly formed state would be positioned in a strategically significant part of the world and could be a strong American ally.

I. BACKGROUND

Despite their long history in the Middle East, the Kurds still do not have their own state. With a population of thirty-five million people, they are the largest ethnic group in the world without a state.¹⁵ The Zakrus Mountains, which separate Iran from Iraq, are considered to be their historical homeland.¹⁶ Today, most Kurds live in what are now the countries of Turkey, Iran, and Iraq.¹⁷

A Kurdish state has long been the dream of Kurds. The dream came close to reality after World War I, when the Kurds were promised a state in the Treaty of Sèvres.¹⁸ Article 62 of the Treaty of Sèvres called for “a scheme of local autonomy for the predominantly Kurdish areas.”¹⁹ The Treaty also specified that the Kurds had the right to petition the League of Nations for independence.²⁰ Turkey, however, did not accept the Treaty, and it was never ratified. Instead, it was replaced with the Treaty of Lausanne, which made no mention of Kurdish statehood.²¹

¹⁴ See *infra* Part IV.

¹⁵ Special Verdict, Case No 1/ CSecond/2006, Al Anfal, Iraq High Tribunal, Second Criminal Court, at 38 (2007), available at <http://law.case.edu/grotian-moment-blog/anfal/opinion.asp> [hereinafter Anfal Case].

¹⁶ In the Cimmerian language, “Kurds” means “residents of the mountains,” which is appropriate considering the terrain of the region. *Id.*

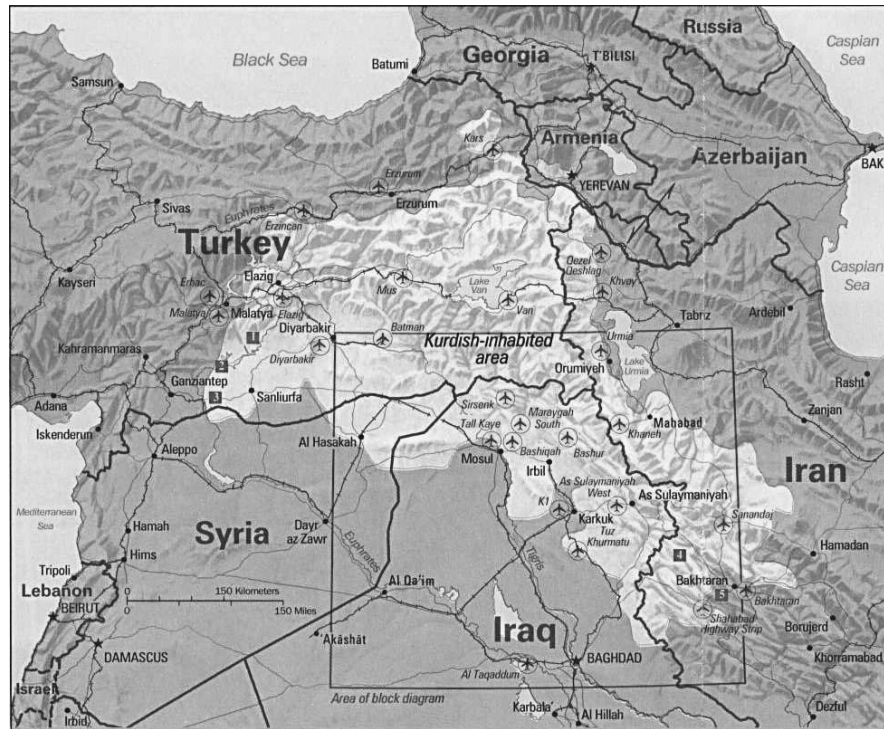
¹⁷ See *infra* Figure One; SUSAN D. MOELLER, COMPASSION FATIGUE 38 (1999).

¹⁸ See Brendan O’Leary & Kahled Salih, *The Denial, Resurrection, and Affirmation of Kurdistan*, in THE FUTURE OF KURDISTAN IN IRAQ 3, 4 (Brendan O’Leary et al. eds., 2005).

¹⁹ Treaty of Peace Between the Allied and Associated Powers and Turkey art. 62, Aug. 10, 1920 (never ratified, superseded by the Treaty of Lausanne), reprinted in 15 AM. J. INT’L L. 179 [hereinafter Treaty of Sèvres].

²⁰ *Id.* art. 64.

²¹ O’Leary & Salih, *supra* note 18, at 4.

Figure One: Map of Kurdish-Inhabited Areas²²

Prior to the British invasion during World War I, the area that is now known as the modern state of “Iraq” was under Ottoman rule.²³ The area was made up of three provinces around the towns of Basra, Baghdad, and Mosul, occupied mostly by Shiite Arabs, Sunni Arabs, and the Kurds, respectively.²⁴ At the conclusion of World War I, the borders of the Middle East were drawn by the European allies at the Conference at San Remo in April 1920.²⁵ The allies made borders that were essentially straight lines drawn on a map of the Middle East that did not consider the traditional boundaries of the region.²⁶ The borders divided some tribes and placed rival tribes together. The British were given control of Basra, Baghdad, and Mo-

²² U.S. Central Intelligence Agency Map, Perry-Castañeda Library Map Collection at The University of Texas at Austin (1992), http://www.lib.utexas.edu/maps/middle_east_and_asia/kurdish_lands_92.jpg (last visited Mar. 12, 2008).

²³ WILLIAM R. POLK, UNDERSTANDING IRAQ 67 (Harper Perennial 2006).

²⁴ CHARLES TRIPP, A HISTORY OF IRAQ 8 (3d ed. 2007).

²⁵ COURTNEY HUNT, THE HISTORY OF IRAQ 61 (2005).

²⁶ *Id.*

sul, and decided to combine the three provinces into one territory that would later become the state of Iraq.²⁷ By deciding to combine the three provinces, the British ignored the clear territorial and ethnic distinctions in the name of preserving what was historically called “Mesopotamia.”²⁸ Most strikingly, “the British had no empathy or understanding of the cultural impact of combining the Shiite and Sunni segments of the [territory into one] country.”²⁹ These arbitrary borders split the Kurds into three countries—Iran, Iraq, and Turkey—and left them without a state.³⁰

The Iraqi Kurds have suffered greatly as a result of their not having an independent state. Under the regime of Saddam Hussein, the Iraqi Kurds have been the victims of crimes against humanity and genocide. Most notably, in the late 1980s the Iraqi armed forces launched what is known as the Anfal campaign. During the Anfal campaign, “Iraqi armed forces . . . systematically destroyed more than four thousand Kurdish villages and several small cities.”³¹ In 1987 and 1988 the Iraqi armed forces unleashed chemical weapons and organized the deportation and execution of Kurdish civilians.³² As many as 182,000 Kurdish civilians were killed, making the Anfal campaign one of the deadliest atrocities in the last thirty years.³³ With the help of the international community, the Iraqi High Tribunal convicted the Anfal campaign’s leaders of genocide, the most severe crime in the world.³⁴

A de facto Kurdish state emerged in Northern Iraq following the Gulf War in 1991.³⁵ Ironically, an American decision during the Gulf War intended to prevent any Kurdish state gave the Kurds the relative independence that they now enjoy. In the midst of an air campaign in February 1991, George H. W. Bush called on the Iraqi military and people to overthrow Saddam Hussein. However, Bush declined to move troops into Bagh-

²⁷ POLK, *supra* note 23, at 82.

²⁸ INTER-ALLIED COMM’N ON MANDATES IN TURKEY, THE KING-CRANE COMM’N REPORT (1919), available at <http://www.ipcri.org/files/kingcrane.html> (“We recommend . . . that the unity of Mesopotamia be preserved. . . . It should probably include at least the Vilayets of Basra, Bagdad, and Mosul. And the Southern Kurds and Assyrians might well be linked up with Mesopotamia. The wisdom of a united country needs no argument in the case of Mesopotamia.”).

²⁹ HUNT, *supra* note 25, at 62.

³⁰ *Id.*

³¹ Peter W. Galbraith, *What Went Wrong, in THE FUTURE OF KURDISTAN IN IRAQ*, *supra* note 18, at 235–36.

³² *Id.* at 236.

³³ See Human Rights Watch, *supra* note 9.

³⁴ Anfal Case, *supra* note 15, at 38 (convicting Ali Hassan al-Majid, known as “Chemical Ali” and five other military leaders of Saddam Hussein’s regime of genocide for their role in the Anfal campaign).

³⁵ Michael M. Gunter, *Kurdish Future in a Post-Saddam Iraq*, 23 J. OF MUSLIM MINORITY AFF. 9, 9 (2003).

dad to overthrow Saddam Hussein. This decision allowed Saddam Hussein's army to move north and suppress a rebellion of Shiites and Kurdish rebels trying to overthrow Saddam.³⁶ Fearing for their lives, as Iraqi forces advanced into Northern Iraq, hundreds of thousands of people fled to the Turkish and Iranian borders. The Turks refused to let the Kurds into Turkey, but allowed reporters to televise pictures of people "dying in a sea of human agony."³⁷ These pictures prompted the Bush administration to re-intervene in Iraq.³⁸ The United States protected the region by implementing a no-fly zone and creating a "safe haven" that effectively gave the Iraqi Kurds de facto control of the territory.³⁹

In May 1992, the Kurds held the first genuinely democratic election in the history of Iraq. This parliamentary election ended in a virtual tie between the Kurdistan Democratic Party (KDP), led by Masoud Barzani, and the Patriotic Union of Kurdistan (PUK), led by Jalal Talabanni. After the election, the two main parties decided not to have a run-off election but to share power in a Council of Ministers. In the mid-1990s, this power sharing arrangement collapsed and an intra-Kurdish civil war ensued. The war was ended in September 1998 with help from American mediation.⁴⁰

After the civil war, the Kurdistan region was divided into two administrations, both claiming to be the Kurdistan Regional Government. At the time the Iraqi Constitution was passed, it was not clear which government was meant by the Kurdish regional government—as referred to in the Constitution—because there were effectively two governments. Since the Iraqi Constitution was approved by the Iraqis, the KDP and the PUK signed the Kurdistan Regional Government Unification Agreement (Unification Agreement), which outlined how the two parties would share power in one government, on January 21, 2006.⁴¹ The agreement calls for rotating the position of Prime Minister between the KDP and the PUK. Initially, the KDP will control the post of Prime Minister and the PUK will control the newly created position of Vice President of the Region. The PUK also will initially have the position of Speaker of the Kurdistan National Assembly.

Despite all of this turmoil, the two administrations have started to function like the government of a sovereign state. United Nations Resolution 986, which ensured that thirteen percent of Iraq's oil revenues would be

³⁶ Peter W. Galbraith, *Kurdistan in Federal Iraq*, in *THE FUTURE OF KURDISTAN IN IRAQ*, *supra* note 18, at 268.

³⁷ *Id.* at 269.

³⁸ *Id.*

³⁹ Gunter, *supra* note 35.

⁴⁰ Peter W. Galbraith, *Kurdistan in Federal Iraq*, *supra* note 18, at 269.

⁴¹ Kurdistan Regional Government Unification Agreement, Jan. 21, 2006, <http://www.krg.org/articles/detail.asp?lngnr=12&smap=04030000&rn=107&anr=8891> (last visited Mar. 1, 2008).

spent on projects in the Kurdistan region, greatly helped the Kurds.⁴² Moreover, with the revenue from the Oil-for-Food program, Kurdistan stabilized and began to grow its economy.⁴³ Although Northern Iraq has functioned as a de facto independent state since 1991, no country recognizes this state.⁴⁴

During the American invasion of Iraq in 2003, the Kurdistan region's army, fought alongside the Americans in the campaign to oust Saddam Hussein from power.⁴⁵ With the fall of Saddam after the U.S. invasion, the Kurdish region gained even more autonomy and was completely freed from the control of an oppressive dictator.

Compared to the rest of the Iraqis, the Iraqi Kurds enjoy the country's highest living standard, highest level of foreign investment, and the highest level of security.⁴⁶ They are engaging in foreign relations with other countries and even hosting travelers and tourists from Europe.⁴⁷ Although they are pleased with being liberated from Saddam and having more control over their region, the Iraqi Kurds have not yet achieved their ultimate dream of obtaining a fully independent sovereign state.

II. THE IRAQI KURDS POSSESS THE RIGHT OF SELF-DETERMINATION

The principle of self-determination is that distinct groups of people have the legal right to determine for themselves to which state they wish to belong. The idea was first articulated by President Woodrow Wilson at the beginning of the twentieth century.⁴⁸ President Wilson analogized self-determination to the American ideal of democracy and promoted it as the "foreign extension of American norms of political fairness."⁴⁹ Self-determination now is firmly grounded in international law and both the U.N.

⁴² KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE, IRAQ: OIL-FOR-FOOD PROGRAM, INTERNATIONAL SANCTIONS, AND ILLICIT TRADE 2-4 (2003).

⁴³ See Gunter, *supra* note 35, at 9.

⁴⁴ Gunter, *supra* note 35, at 9.

⁴⁵ Rubin, *supra* note 4, at 2.

⁴⁶ *Id.* at 1.

⁴⁷ *Id.*

⁴⁸ Woodrow Wilson, Reply of President Woodrow Wilson to the Addresses of the Imperial German Chancellor, and the Imperial and Royal Austro-Hungarian Minister for Foreign Affairs (Feb. 11, 1918), reprinted in OFFICIAL STATEMENTS OF WAR AIMS AND PEACE PROPOSALS, DECEMBER 1916 TO NOVEMBER 1918, at 265, 268 (James B. Scott ed. 1921) ("'Self-determination' is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.").

⁴⁹ Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 180 (1991).

Charter⁵⁰ and resolutions of the U.N. General Assembly incorporate the principle.⁵¹

In order for a group of people to attain the right to determine their political destiny—i.e., to choose which state they belong to—the group must be sufficiently “distinct.” The criteria for establishing what groups of people are sufficiently “distinct” can be split into objective elements and subjective elements. Objective elements include “common racial background, ethnicity, language, religion, history and cultural heritage.”⁵² To satisfy the subjective element, the group has to perceive itself collectively as a distinct “people.”⁵³

The right to self-determination can include the right to secession in certain cases. Generally, under international law, no country or group of people has the right to violate the territorial integrity of a country. However, self-determination trumps territorial integrity when a country has: (1) violated the “economic, social, and cultural development” of a people, as required by U.N. General Assembly Resolution 2625;⁵⁴ and (2) the people have a valid territorial claim to the area that they wish to claim.⁵⁵ In the case of genocide, territorial integrity yields to self-determination.⁵⁶ In addition,

⁵⁰ The U.N. Charter provides the foundation of self-determination. *See* U.N. Charter art. 1, para. 2 (declaring the purpose of the United Nations is “[t]o develop friendly relations among nations based on respect for the principles of equal rights and self-determination”); *Id.* art. 55 (concerning the promotion of international and social cooperation based on self-determination); *Id.* art. 56 (pledging all members will enforce article 55); *Id.* art. 73 (using the terms “self-government . . . political aspirations . . . [and] progressive development of . . . free political institutions” even though self-determination is not explicitly mentioned).

⁵¹ *See, e.g.*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No 28, at 123, U.N. Doc. A/8028 (Oct. 24, 1970) (noting that when a country does not conduct itself in compliance with “the principle of equal rights and self-determination . . . all peoples have the right to freely determine . . . their political status and to pursue their economic, social and cultural development”).

⁵² PUBLIC INT’L LAW AND POLICY GROUP & NEW ENGLAND CENTER FOR INT’L LAW AND POLICY, THE NAGORNO-KARABAGH CRISIS: A BLUEPRINT FOR RESOLUTION 18 (2000), at 18, available at <http://www.nesl.edu/center/pubs/nagorno.pdf> [hereinafter NAGORNO-KARABAGH CRISIS REPORT].

⁵³ Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT’L L. 257, 276 (1981).

⁵⁴ THE NAGORNO-KARABAGH CRISIS REPORT, *supra* note 52, at 22.

⁵⁵ Gregory J. Ewald, *The Kurds Right to Secede Under International Law: Self-Determination Prevails Over Political Manipulation*, 22 DENV. J. INT’L L. & POL’Y 375, 397–98 (1994).

⁵⁶ *See* Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT’L L. 779, 841 (1976) (noting “[t]he denial of fundamental human rights for the sake of preserving the territorial integrity of a body politic is incompatible with the newly emerging principle of *jus cogens*.”); UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 187 (1972) (noting that “[i]f the

de facto independence is a special factor that strengthens the right to self-determination over maintaining the territorial integrity of a state.⁵⁷ When a group—such as the Kurds—is the victim of genocide, has a valid territorial claim, and has achieved de facto statehood, the case for self-determination trumping territorial integrity is quite compelling.

A. *The Kurds Satisfy the Objective Elements of Self-Determination*

Based on their common language, religion, ethnicity, history, and culture, the Kurds satisfy the objective elements required to possess the legal right of self-determination. The Kurds share the common language of Kurdish. Although Kurdish is commonly referred to as a language, there are four distinctive dialects.⁵⁸ The dialects are similar enough that they are commonly referred to as simply “Kurdish.” Schools and universities teach Kurdish and both broadcast and print media use Kurdish as well.⁵⁹ In the Kurdish region, Arabic hardly is used at all. In fact, few Kurds under twenty-five even understand Arabic.⁶⁰ Moreover, schools are starting to teach English as much as Arabic as a second language.⁶¹

The Iraqi Kurds share a common religion. Almost all of the Kurds are Sunni Muslim. More importantly, the Kurds share a similar outlook on the role religion should play in society. The Kurds believe that the Iraqi Kurdistan should remain secular.⁶² In the Kurdish region, all religious groups and sects are allowed to freely follow their religious practices.⁶³

Finally, the Iraqi Kurds are a distinct ethnicity with a common history. They are a distinct ethnicity that “dates back to 2000 BC when the first

principle of territorial integrity (sic) is clearly incompatible with that of self-determination, the former must, under present international law, give way to the latter.”).

⁵⁷ See Committee of Jurists, Report on the Aland Islands Question, League of Nations O.J. Spec. Supp. 3, at 6 (1920) (“From the point of view of both domestic and international law, the formation, transformation and dismemberment of States as a result of revolutions and wars create situations which, to a large extent, cannot be met by the application of the normal rules of positive law. . . . This transition from a de facto situation to a normal situation de jure cannot be considered as one confined entirely within the domestic jurisdiction of a State. It tends to lead to readjustments between the members of the international community and to alterations in their territorial and legal status.”).

⁵⁸ Alexander Dawoody, *The Kurdish Quest for Autonomy and Iraq’s Statehood*, 41 J. ASIAN & AFRICAN STUDIES 483, 484 (2006).

⁵⁹ Ofra Bengio, *Autonomy in Kurdistan in Historical Perspective*, in THE FUTURE OF KURDISTAN IN IRAQ, *supra* note 18, at 176.

⁶⁰ *Does Independence Beckon?*, *supra* note 1.

⁶¹ *Id.*

⁶² Peter W. Galbraith, *What Went Wrong*, in THE FUTURE OF KURDISTAN IN IRAQ, *supra* note 18, at 244.

⁶³ Molly McNulty, *Not to be Forgotten: Children’s Rights in the Permanent Constitution*, in THE FUTURE OF KURDISTAN IN IRAQ, *supra* note 18, at 143, 156.

vanguard of Indo-European-speaking people arrived and settled” in the area known as “Kurdistan.”⁶⁴ There they established their first state, the Medean Empire in 600 BC,⁶⁵ which “disintegrated into smaller kingdoms and city-states that gradually fell under the domination of the Roman or Parthian Empires.”⁶⁶ After the Medean Empire, “[n]o significant Kurdish state emerged until 1171, when the Kurdish tribe of the Ayyubids became a dominant political player in Islam.”⁶⁷ The Ayyubids Dynasty collapsed in 1249.⁶⁸ After the collapse of the Ayyubids Dynasty, “[i]n 1750, a fairly large Kurdish kingdom of the Zand was born and continued for 117 years. In 1867, however, it collapsed at the hands of the Ottoman Turks. No other Kurdish entity was established until 1945.”⁶⁹ In 1945, “the former Soviet Union assisted in the creation of the Kurdish Republic of Mahabad in western Iran.”⁷⁰ In less than a year, however, this republic collapsed after the Soviets withdrew.⁷¹ The Kurds’ struggle for statehood and autonomy over the last few thousands of years demonstrates that, despite turmoil and upheaval in the region, the Kurds are bonded more by their heritage and common history than by any territorial line.

B. The Kurds Satisfy the Subjective Element of Self-Determination

The Kurds also satisfy the subjective element of self-determination because they perceive themselves collectively as Kurds. Although the Iraqi Kurds have been part of Iraq for eighty years, the Kurds do not identify themselves as Iraqi and prefer not to be part of Iraq. In January 2004, in the span of just one month, two-thirds of Kurdistan’s adults signed a petition demanding a vote on whether Kurdistan should remain part of Iraq.⁷² Immediately after the fall of Saddam Hussein, the Kurds submitted a proposed Constitution to the Iraqi Governing Council that would make Kirkuk the Kurdish capital and give the Kurds the constitutional right to secede from

⁶⁴ Dawoody, *supra* note 58, at 484.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Peter W. Galbraith, *Kurdistan in Federal Iraq*, in *THE FUTURE OF KURDISTAN IN IRAQ*, *supra* note 18, at 243.

Iraq at any time.⁷³ Although the Sunnis and Shiites rejected this proposal, it demonstrated the Kurdish desire for autonomy.⁷⁴

The common identity of the Kurds has been particularly evident since the first Gulf War. Since the war, the Kurds have enjoyed the longest period of self-rule in a century, allowing them to freely express their culture and identity in substantive and symbolic forms.⁷⁵ National symbols have been displayed throughout the country. Perhaps the most important national symbol is a common flag. Kurdish flags fly throughout Kurdish region. More strikingly, the Iraqi flag is rarely displayed.⁷⁶ In addition to the flag, the Kurds have developed a Kurdish hymn and have erected statutes and portraits of Kurdish heroes, such as Mustafa Barzani and Mahmud Barznji.⁷⁷ Although flags, statutes, and hymns may be only symbols, they are significant because they are tangible indications of a Kurdish sense of common identity. Given that the Kurds see themselves collectively as Kurds and have been fighting for self-rule, there is little doubt that they satisfy the subjective element of self-determination.

C. *The Kurds Have a Right to Self-Determination that Includes a Right to Independence*

The right to self-determination in the case of the Kurds outweighs the desire to maintain the territorial integrity of Iraq. Saddam Hussein's regime clearly violated the economic, social, and cultural rights of the Kurds through the genocide of the Anfal campaign. The strongest rationale for declaring self-determination claims superior to territorial integrity claims is very simple: democratic self-government is more righteous than the feudal, undemocratic, and oppressive values associated with preserving territorial boundaries.⁷⁸ There is no stronger case for applying this rationale than in the case of genocide.

The Kurds have the valid territorial claim necessary to have a right to self-determination that includes the right of secession. Since the Kurds have occupied the same territorial region for thousands of years—managing to stay on their homeland and retain their distinct culture despite both efforts by other countries to take over their land, assimilate them, and general regional upheaval—they possess a legitimate claim to the territory.⁷⁹ Since

⁷³ Bill Park, *Iraq's Kurds and Turkey: Challenges for US Policy*, 34 *PARAMETERS* 18, 20 (2004).

⁷⁴ *See id.*

⁷⁵ *See* Bengio, *supra* note 59, at 176.

⁷⁶ *Does Independence Beckon?*, *supra* note 1.

⁷⁷ Bengio, *supra* note 59, at 176.

⁷⁸ Brilmayer, *supra* note 49, at 184.

⁷⁹ *See supra* Part II.B–C.

the Treaty of Lausanne failed to include an independent Kurdish nation, the Kurds subsequently fought the British in Iraq and the Iraqis to obtain an independent or autonomous homeland. Based on this history, the Kurds have a legitimate claim to the territory.

D. Kurdish Territory in Northern Iraq Satisfies the Criteria for Statehood

The qualification of a “state” under international law is defined by the 1933 Montevideo Convention on the Rights and Duties of States.⁸⁰ The Montevideo Convention requires states to possess all four of the following requirements: “(1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with the other states.”⁸¹ The Kurds satisfy all four requirements of the Montevideo Convention.

First, the Kurdistan region satisfies the permanent population element because the Iraqi Kurds are clearly a permanent population of about four million people.⁸² This is more than enough people to qualify as a state since countries with populations of less than 300,000 people are recognized by the United Nations.⁸³

Second, the Kurdistan region meets the defined territory element because even the Iraqi Constitution recognizes the region as a territory.⁸⁴ The fact that the boundaries of the Kurdistan region have not been definitively settled does not disqualify Kurdistan from being considered a state since an entity may satisfy the territorial requirement for statehood even if

⁸⁰ See Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 [hereinafter Montevideo Convention]. The Montevideo Convention is the most authoritative and most cited source for defining statehood. See, e.g., Thomas D. Grant, *The Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 414 (1999); M. Kelly Malone, Comment, *The Rights of Newly Emerging Democratic States Prior to International Recognition and the Serbo-Croatian Conflict*, 6 TEMP. INT'L & COMP. L.J. 81, 83 (1992); J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT'L L. REV. 9, 14 (1991). The Restatement (Third) of Foreign Relations Law repeats the qualifications of the Montevideo Convention and notes that they are “well-established in international law.” Restatement (Third) of Foreign Relations Law of the United States § 201 cmt. a. (1987) [hereinafter Restatement].

⁸¹ Montevideo Convention, *supra* note 80, art. 1.

⁸² GARETH R. V. STANSFIELD, IRAQI KURDISTAN 33 (2003).

⁸³ See, e.g., Environment Statistics Country Snapshot: Iceland, http://unstats.un.org/unsd/ENVIRONMENT/envpdf/Country%20Snapshots_apr2007/Iceland.pdf (last visited Apr. 19, 2009) (population 295,000); Environment Statistics Country Snapshot: Andorra, http://unstats.un.org/unsd/environment/envpdf/Country%20Snapshots_apr2007/Andorra.pdf (last visited Apr. 19, 2009) (population 67,000); Environment Statistics Country Snapshot: Tuvalu, http://unstats.un.org/unsd/environment/envpdf/Country%20Snapshots_apr2007/tuvalu.pdf (last visited Apr. 19, 2009) (population 10,000).

⁸⁴ Iraq Constitution, art. 4, 113, 137, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450_pf.html.

its boundaries are not settled or some of its territory is claimed by another state.⁸⁵

Third, the Kurdistan region satisfies the government element because it has a government. Although a state is not required to have any particular form of government, there must be some authority exercising governmental functions.⁸⁶ Under Iraq's Constitution, the central government in Baghdad has almost no control. The Constitution recognizes the Kurdish region and gives the KRG substantial control of it.⁸⁷ The KRG has the right to cancel federal laws, determine the tax rates of people living in the Kurdish region, and control the oil and water in the region.⁸⁸ In addition, the KRG is responsible for security in the Kurdish region and oversees the *peshmerga* fighters, which include about 75,000 Kurdish troops.⁸⁹ The *peshmerga* are armed troops charged with the vital mission of ensuring that the insurgency in Arab-Iraq does not enter the north.⁹⁰ The KRG is a parliamentary system of government similarly structured to European democracies such as the government in the United Kingdom. The Kurdistan National Assembly is the KRG's democratically elected parliament and has been elected five times since 1992.⁹¹

Finally, the Kurds will undoubtedly be able to enter into relations with other states. In many respects, it appears as if the Kurdish Regional Government already is conducting its own foreign policy. The Kurdish Regional Government has established a Department of Foreign Relations and has appointed a Head of the Department.⁹² The KRG receives members of foreign governments and conducts both foreign policy and public relations independent of Baghdad. Members of the U.S. Congress have visited Northern Iraq and have been hosted by the Kurdistan Regional Government.⁹³ The

⁸⁵ Restatement, *supra* note 80, § 201 cmt. b ("An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of its boundaries are disputed, or if some of its territory is claimed by another state.").

⁸⁶ *Id.* cmt. d.

⁸⁷ See Iraq Constitution, *supra* note 84, arts. 4, 113, 137.

⁸⁸ Peter W. Galbraith, *Iraq: The Way to Go*, THE N.Y. REV. BOOKS (Aug. 16, 2007).

⁸⁹ KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE, THE KURDS IN POST-SADDAM IRAQ 3 (2008).

⁹⁰ *Id.* at 4.

⁹¹ *Does Independence Beckon?*, *supra* note 1.

⁹² Press Release, Kurdistan Regional Government, *The Department of Foreign Relations – Kurdistan Regional Government* (Aug. 29, 2007), available at <http://www.krg.org/articles/detail.asp?nr=267&lngnr=12&smap=04080000&nr=19906>.

⁹³ See, e.g., Press Release, Kurdistan Regional Government, *Gohmert Sees Progress First Hand in Kurdistan Region* (Jan. 11, 2008), available at <http://www.krg.org/articles/detail.asp?nr=73&lngnr=12&smap=02010200&nr=22273> (reporting U.S. House of Representatives Members Louie Gohmert and Dana Rohrabacher visited Iraq and were hosted by the Kurdistan Regional Government); Press Release, Representative Lincoln

Kurdistan Regional Government also has met with the U.S. Secretary of State and with the U.K. Foreign Secretary.⁹⁴ After each of these meetings there was a press conference with the U.S. or U.K. leader and KRG President Masoud Barzani.⁹⁵ Both press conferences looked exactly like those held in other recognized countries that these foreign secretaries have visited. There were two podiums with flags on each side; noticeably absent from both press conferences was an Iraqi flag behind President Barzani. Instead, there was a Kurdish flag. The imagery of the press conferences projected a powerful message to the international community: the Kurdistan region was something far greater than a mere province of Iraq. It was much more substantial. The KRG was essentially conducting its own foreign policy. Normally, conducting foreign policy is something reserved for sovereign states, not provinces of countries.

III. THE IRAQI KURDS CAN PEACEFULLY SECEDE THROUGH THE PROCESS OF “EARNED SOVEREIGNTY”

Fulfilling the criteria for self-determination and the criteria for statehood does not automatically lead to the formation of a new state. In order to form a new, independent state, the Kurds must secede from Iraq. A poorly-planned secession could jeopardize their chances of international recognition, which depends largely on political persuasion. In order to maximize their chances of achieving international recognition, the Kurds must pay close attention to the concerns of the major international powers.

Although the Kurds may be entitled to the right of self-determination under international law, an immediate secession from Iraq is not the best way to ensure stability in the region and realistically gain enough support in the international community to merit recognition. The most viable political option, based on its likelihood of long-term success and minimization of short-term violence, is the “earned sovereignty” approach.

Davis, *Congressman Lincoln Davis Returns from Official CODEL to Iraq, Afghanistan, Kuwait* (Jan. 16, 2008), available at <http://www.house.gov/lincolndavis/news/releases/2008/080116.htm> (reporting Lincoln Davis, Marsha Blackburn, Tim Walberg, John Barrow, Brad Miller, and Nikki Tsongas also visited with the Kurdistan Regional Government).

⁹⁴ Press Release, Kurdistan Regional Government, *U.K. Foreign Secretary and President Barzani Discuss Closer Ties* (Dec. 18, 2007), available at <http://www.krg.org/articles/detail.asp?lngnr=12&smap=02010100&nr=223&anr=22021>; Press Release, U.S. Dep’t of State, *Remarks with Massoud Barzani, President of the Kurdish Regional Government After Their Meeting* (Oct. 6, 2006), available at <http://www.state.gov/secretary/rm/2006/73702.htm>.

⁹⁵ Press Release, Kurdistan Regional Government, *supra* note 94; Press Release, U.S. Dep’t of State, *supra* note 94.

A. *An Overview of the “Earned Sovereignty” Approach*

A gradual transition to an independent state would alleviate concerns about sudden upheaval in Iraq and could be accomplished through implementing an “earned sovereignty” approach to self-determination. Earned sovereignty “entails the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision.”⁹⁶ In short, earned sovereignty is a gradual transition of power with international approval. With such an approach, the Iraqi Kurds could gradually transition from Iraqi authority to having their own independent sovereign state. The successful implementation of the earned sovereignty approach in conflicts around the world demonstrates its potential for success in the Kurdish region of Iraq.

Traditional approaches to resolving sovereignty-based conflicts can be characterized as either “sovereignty first” approaches or “self-determination first” approaches.⁹⁷ The “sovereignty first” approach is based primarily upon the principles of sovereignty, territorial integrity, and political independence.⁹⁸ The “self-determination first” approach is based upon the legal principles relating to self-determination and the protection of human rights.⁹⁹ In general, state wishing to preserve their territorial integrity rely on the “sovereignty first” approach, and secessionist movements rely on the “self-determination first” approach.

History has shown that these two approaches have failed to provide acceptable options for structuring peaceful resolutions to conflicts based on claims of sovereignty. The main problem with strictly adopting the “sovereignty first” approach is that it can justify the actions of regimes that pursue aggressive action against their own people under the auspices of maintaining territorial integrity and sovereignty.¹⁰⁰ Moreover, “the mantra of sovereignty has been used by states to shield themselves from international action resulting from human rights abuses committed as part of their attempts to stifle self-determination movements.”¹⁰¹ One has to look no further than the Anfal campaigns against the Kurds in Iraq to realize how aggressive regimes can use their power under the guise of sovereignty to repress minorities.

The “self-determination first” approach has flaws as well. “Self-determination” rhetoric has been abused in the past and is often used by

⁹⁶ Paul R. Williams & Francesca J. Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN. J. INT'L L. 347, 350–54 (2004).

⁹⁷ *Id.* at 350.

⁹⁸ *See id.* at 350–51.

⁹⁹ *See id.* at 351.

¹⁰⁰ *See id.*

¹⁰¹ *Id.* at 354.

rebels to justify violence. In Iraq, the mantra of self-determination has been used by the Kurdistan Workers Party (PKK), a terrorist group, to justify violent tactics in the name of achieving independence.¹⁰² The risk of endorsing a “self-determination first” approach and immediately calling for Kurdish succession is that this would simply supply the PKK and other separatist groups in the Kurdish region with international justification and support for a potential campaign of violence. Moreover, any violence or terrorism by the PKK could be used by Turkey as justification for continuing air campaigns and bombings in Northern Iraq, which are obviously destabilizing to the region.¹⁰³

The “earned sovereignty” approach seeks to address the inherent flaws with the “sovereignty first” approach and the “self-determination first” approach. In Northern Iraq, the primary advantage of following an “earned sovereignty” approach is that it will prevent the Arab majority in Iraq and Turkey from using a guise of “territorial integrity” and state sovereignty to justify committing horrific acts against the Kurds, similar to those done in the past. To the extent possible, an “earned sovereignty” approach also will limit the backlash from other states in the region—like Turkey—that may use “territorial integrity” arguments to maintain current boundaries of Iraq at the peril of the Kurds’ human rights. Finally, an “earned sovereignty” approach also may address some of the inherent problems with strict application of the “self-determination first” approach. An “earned sovereignty” approach could reduce the violence caused by separatist rebels in the PKK wishing to use any means necessary to form an independent state.

B. The Elements of “Earned Sovereignty”

There are three main elements of earned sovereignty. The first element is shared sovereignty. At this stage, “the state and substate entity may both exercise some sovereign authority . . . over a defined territory.”¹⁰⁴ The second element is institution building. During this stage, the substate works with the international community to develop the political infrastructure and government institutions needed to handle the increased authority involved in successfully administering a sovereign country.¹⁰⁵ The third element is the determination of the final status of the substate entity and its relationship to the parent state. This stage can be resolved through referendum or a negotiated settlement between the state and the substate entity.¹⁰⁶ Ultimately, the

¹⁰² Bruce Fein, *Unveiling the PKK*, WASH. TIMES, Jan. 3, 2008, at A13.

¹⁰³ See *Turkey and Iraq: Raids Across the Border*, ECONOMIST, Dec. 22, 2007, at 79.

¹⁰⁴ Williams & Pecci, *supra* note 96, at 355.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 355–56.

determination of final status for the substate entity depends on the consent of the international community in the form of international recognition.¹⁰⁷

C. *Successful Implementation of "Earned Sovereignty" Around the World*

The earned sovereignty approach has been implemented successfully around the world. Montenegro, Kosovo, and Northern Ireland are all examples of successful implementation of the earned sovereignty approach. In all three cases, varying degrees of the earned sovereignty approach was used to end ethnic struggles.

1. Montenegro

Like the Kurds, the Montenegrins have a history of independence in spite of regional upheaval.¹⁰⁸ After the dissolution of the Yugoslav federation in 1989, Serbia and Montenegro joined in passing the Constitution of the Federal Republic of Yugoslavia.¹⁰⁹ According to the U.S. State Department, although Montenegro reaffirmed its attachment to Serbia by signing the Constitution, a distinct sense of Montenegrin identity persisted.¹¹⁰ Most notably, "[t]he government of Montenegro was critical of Yugoslav President Slobodan Milosevic's 1998-99 campaign in Kosovo, and . . . boycotted the September 2000 federal elections, which led to the eventual [fall] of Milosevic's regime."¹¹¹

The European Union (EU) brokered a treaty between Serbia and Montenegro that allowed for the sharing and gradual devolution of all sovereign authority between Serbia and Montenegro.¹¹² The Union Treaty between Serbia and Montenegro called for three years of shared sovereignty followed by a referendum to give final approval of the dissolution of the union with Serbia.¹¹³ On May 21, 2006, the people of Montenegro passed a referendum and Montenegro declared independence from the political entity

¹⁰⁷ *Id.*

¹⁰⁸ U.S. Dep't of State, Bureau of Eur. and Eurasian Affairs, Background Note: Montenegro (Dec. 2008), <http://www.state.gov/r/pa/ei/bgn/70949.htm> [hereinafter Background Note: Montenegro] (explaining that Montenegro resisted the rule of the Ottoman Turks and managed to maintain its independence at the end of the nineteenth century and "was recognized as an independent state by the Great Powers of Europe assembled at the Congress of Berlin").

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Williams & Pecci, *supra* note 96, at 357.

¹¹³ CONSTITUTIONAL CHARTER OF THE STATE UNION OF SERBIA AND MONTENEGRO, art. 60, available at http://www.mfa.gov.yu/Facts/const_scg.pdf. (last visited Apr. 19, 2009).

of Serbia and Montenegro on June 3, 2006.¹¹⁴ Serbia, the European Union, and all permanent members of the United Nations Security Council, including the United States, recognize the Republic of Montenegro's independence.¹¹⁵

With ethnic struggles and political upheaval largely behind it, Montenegro is poised for peace and economic prosperity. Perhaps the biggest political achievement in Montenegro is the progress of EU accession negotiations. These negotiations picked up speed after Montenegro declared its independence.¹¹⁶ In October 2007, Montenegro and the EU signed the Stabilization and Association Agreement, which opened up trade between Montenegro and the EU market.¹¹⁷ The political progress in Montenegro has led to economic progress. Foreign direct investment (FDI) in 2007 reached \$1.379 billion, which is ten times higher than in 2004.¹¹⁸ Although \$1.379 billion may not seem that high, with a population of only 630,000, investment per capita is \$2,223, which is one of the highest rates in Europe.¹¹⁹

2. Kosovo

Prior to February 17, 2008, when Kosovo's parliament declared Kosovo's independence from Serbia, Kosovo was a region in Serbia. In 1998, Serbia was in turmoil when the Kosovar Albanians sought independence from Serbia. The United States and NATO intervened by sending planes to bomb the Serbs in order to prevent them from "ethnically cleansing" the Albanians.¹²⁰ After the bombing campaign, on June 9, 1999, NATO and the Federal Republic of Yugoslavia—now the countries of Serbia and Montenegro—"signed an agreement for the withdrawal of Yugoslav forces from Kosovo."¹²¹ On June 10, 1999, the Security Council passed Resolution 1244, creating the United Nations Interim Administration Mission in Kosovo (UNMIK). Resolution 1244 "provide[s] an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and . . . provide[s]

¹¹⁴ Background Note: Montenegro, *supra* note 108.

¹¹⁵ *Id.*

¹¹⁶ *Montenegro Gets Boost for EU Bid*, BBC NEWS, Oct. 15, 2007, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7045814.stm>.

¹¹⁷ *Id.*

¹¹⁸ Background Note: Montenegro, *supra* note 108.

¹¹⁹ *Id.*

¹²⁰ See Michael R. Gordon & Eric Schmitt, *U.S. Sought Shift After Raids Failed to Deter Milosevic*, N.Y. TIMES, Mar. 31, 1999, at A1.

¹²¹ Beth DiFelice, *International Transitional Administration: The United Nations in East Timor, Bosnia-Herzegovina, Eastern Slavonia, and Kosovo – A Bibliography*, 35 INT'L J. LEGAL INFO. 63, 66 (2007).

transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.”¹²²

The UNMIK “assumed responsibility for nearly all of Kosovo’s sovereign authority.”¹²³ Over time, the UNMIK created a Kosovo Constitutional Framework that provided for a parliament, a president, and a mechanism for gradually transferring power to Kosovo’s governing institutions.¹²⁴ Since UNMIK transferred power to Kosovo’s governing institutions, Kosovo has held elections and the two major Albanian parties have struck a power sharing deal.¹²⁵ Both parties in Kosovo agreed that the first priority in Kosovo was to declare independence and worked with the United States and the European Union to calm fears about instability in the region before declaring independence.¹²⁶

On February 17, 2008, Kosovo’s parliament declared Kosovo’s independence from Serbia.¹²⁷ Following Kosovo’s declaration, the U.S. and several European states officially recognized the independence of Kosovo.¹²⁸ However, Serbia and Russia refused to recognize Kosovo’s independence.¹²⁹

Although some suggest that Kosovo may fall into civil war again, the amount of political progress in Kosovo has been tremendous. Ten years ago, thousands of ethnic Albanians that were living in Kosovo were forced to flee their homes out of fear for their lives.¹³⁰ NATO officials estimated that 118,000 ethnic Albanians had been forced out of Kosovo since Serbian tanks moved into Kosovo.¹³¹ The city of Pec, which had a population of about 100,000 ethnic Albanians before the Serbs moved in, was almost totally destroyed.¹³² For the first time in history, Kosovo has its own sovereign state and will no longer be subject to the oppression of the Serbs.

¹²² S.C. Res 1244, ¶ 10, U.N. Doc. S/RES/1244 (June 10, 1999).

¹²³ Williams & Pecci, *supra* note 96, at 361 n.41.

¹²⁴ *Id.* at 366–67.

¹²⁵ See *Kosovo Parties Reach Power Sharing Deal*, INT’L HERALD TRIBUNE, Jan. 7, 2008, <http://www.iht.com/articles/2008/01/07/europe/kosovo.php>.

¹²⁶ *Id.*

¹²⁷ U.S. Dep’t of State, Bureau of Eur. and Eurasian Affairs, Background Note: Kosovo (Dec. 2008), <http://www.state.gov/r/pa/ei/bgn/100931.htm> [hereinafter Background Note: Kosovo].

¹²⁸ Nicholas Kulish & C. J. Chivers, *U.S. and Much of Europe Recognize Kosovo, Which Also Draws Expected Rejection*, N.Y. TIMES, Feb. 19, 2008, at A10.

¹²⁹ *Id.*

¹³⁰ Background Note: Kosovo, *supra* note 127.

¹³¹ Gordon & Schmitt, *supra* note 120.

¹³² *Id.*

3. Northern Ireland

Since the Irish declared independence in 1916, there has been bitter conflict in Northern Ireland between Protestants who wished to remain part of the United Kingdom and Catholics who wanted to join the Republic of Ireland.¹³³ In the thirty years of violence known as “the Troubles,” more than 3,700 people died in sectarian fighting and conflict with the British Army in Northern Ireland.¹³⁴ The Good Friday Agreement halted more than a century of turmoil in Northern Ireland and it governs the political relationship among Northern Ireland, the Republic of Ireland, and Great Britain.¹³⁵

The Good Friday Agreement provides for the creation of institutions in Northern Ireland and the gradual devolution of substantial power to the newly created institutions.¹³⁶ In addition, the Good Friday Agreement specifies that the people of Northern Ireland have the right to decide for themselves the issue of unification with Ireland through a referendum.¹³⁷ Progress on all of the major elements to the Good Friday Agreement has been made.¹³⁸ In particular, the security situation in Northern Ireland has reached a safe level. The IRA disarmed and is no longer considered a terrorist threat.¹³⁹

After over a century of conflict and more than twenty years of failed attempts to reach a peaceful arrangement, the Good Friday Agreement is the first real chance for a long-term peaceful solution. With the prospect of lasting peace ahead of it, Northern Ireland’s economy has improved. This is evident in both the employment market and in real estate.¹⁴⁰ Although Northern Ireland has even greater potential for economic growth, lasting peace will allow for significant long-term advances.

D. *Adopting an Earned Sovereignty Approach in Northern Iraq*

The relative peace and prosperity in Montenegro, Kosovo, and Northern Ireland illustrate that “earned sovereignty” effectively can be used

¹³³ Colleen J. O’Loughlin, *Peace Process Perspective Northern Ireland and the Agreement Reached in the Multi-Party Negotiations Belfast, April 10, 1998*, 13 N.Y. INT’L L. REV. 91, 93–96 (1998).

¹³⁴ Alan Cowell & Eamon Quinn, *Two Former Enemies Are Sworn In to Lead Northern Ireland’s Government*, N.Y. TIMES, May, 9, 2007, at A8.

¹³⁵ See Agreement Reached in Multi-Party Negotiations, Apr. 10, 1998, 37 I.L.M. 751.

¹³⁶ Williams & Pecci, *supra* note 96, at 357.

¹³⁷ Agreement Reached in Multi-Party Negotiations, *supra* note 135.

¹³⁸ U.S. Dep’t of State, Bureau of Eur. and Eurasian Affairs, Background Note: United Kingdom (Jan. 2008), <http://www.state.gov/r/pa/ei/bgn/3846.htm>.

¹³⁹ *Id.*

¹⁴⁰ *A Time of Peace: Improbable and Exhilarating, Self-Government is Back*, ECONOMIST, May 12, 2007, at 60.

to end sovereignty-based conflict in countries that have been plagued by war and violence. All three examples are relevant to the case of the Kurds in Northern Iraq because of the similarities between the conflicts. Like Northern Iraq, the Balkans and Northern Ireland have had a long history of violence and ethnic struggle. Montenegro and Kosovo were both formed after the breakup of the former Yugoslavia.¹⁴¹ Like Yugoslavia, Iraq's boundaries were created by foreign states.¹⁴² In addition, like Yugoslavia, Iraq is a conglomerate of distinct ethnic groups grouped under an umbrella state. The conflict in Northern Ireland also shares relevant similarities with Northern Iraq. Like Northern Iraq, Northern Ireland had a long-lasting conflict between two countries with distinct religious traditions. Given the success of the "earned sovereignty" approach in these countries, it is appropriate to follow a similar approach in the Kurdish region of Iraq.

Adopting an earned sovereignty approach in Northern Iraq could potentially insure lasting peace and prosperity. The first two phases of implementing an "earned sovereignty" approach to conflict resolution are "shared sovereignty" and institution building.¹⁴³ The relationship between the semi-autonomous Kurdish region and Iraq already can be properly described as shared sovereignty. Shared sovereignty is characterized by a period where the substate entity is given substantial elements of self-government.¹⁴⁴ Since the first Gulf War, Iraqi Kurdistan has been autonomous and the Iraqi Kurds have been forced to govern themselves. In all of Iraq, the Kurdish region has the most experience with the democratic process. The Kurds have their own Parliament—elected five times since 1992.¹⁴⁵ The power of the Kurdish people to govern themselves is not only evident in the Kurdish Parliament, but also in the executive arm of the Kurdish Regional Government, which oversees all of the ministries and departments of the government.

Compared to Montenegro, Kosovo, and Northern Ireland, the Kurdish region is more advanced at the inception of its pursuit of statehood in terms of the institutions that are necessary to have a fully-functioning democratic government. The Kurdish region already administers local government services.¹⁴⁶ In addition, the region has already begun building legislative institutions needed in a democratic government, including a democrati-

¹⁴¹ Background Note: Montenegro, *supra* note 108.

¹⁴² *See id.*; *infra*, notes 25–32 and accompanying text.

¹⁴³ *See supra* Part III.B.

¹⁴⁴ Williams & Pecci, *supra* note 96, at 361.

¹⁴⁵ *Does Independence Beckon?*, *supra* note 1.

¹⁴⁶ *Id.*

cally elected Parliament that passes legislation. Lastly, the foreign policy institutions and leadership have already begun to conduct foreign policy.¹⁴⁷

In states with a history of violence and conflict, security is a major concern. Northern Ireland historically has been plagued by extreme groups—such as the Irish Republican Army (IRA) that use terrorism as a way of promoting its goals. The peace process in Northern Ireland illustrates that a gradual approach to sovereignty can successfully facilitate the disarming of extreme terrorist groups such as the IRA.¹⁴⁸ Like in Northern Ireland, the Kurdish region has its own extreme group, the PKK.¹⁴⁹ If it was possible to disarm the IRA in Northern Ireland through a gradual transition of sovereignty, it seems quite plausible that the same thing can be done in Northern Iraq to eventually disarm extreme groups like the PKK. On the security front, some progress has been made in the Kurdish region, but there is a long way to go.¹⁵⁰ In Northern Ireland, the U.K. still maintains security in Northern Ireland. In contrast, the Kurdish region is already ahead of Northern Ireland with respect to implementing its own security force.¹⁵¹ The security force is controlled by the Kurds. Baghdad police, or even foreign forces, are barely present in the region.¹⁵²

Settling border disputes is the Kurds' primary challenge. The main dispute regarding the boundaries of the Kurdistan region is determining the fate of the city of Kirkuk and the surrounding region. The Kirkuk region is immediately adjacent to the official Kurdistan region and is populated predominately with Kurds.¹⁵³ Although the Kirkuk region was historically part of the territory of the Kurds, the Kurdistan region reflects the borders drawn by Saddam Hussein and does not include the Kirkuk region. Saddam Hussein did not want to include Kirkuk in the Kurdistan region because Kirkuk is rich with oil.¹⁵⁴ The Kurds would like this area to be officially recognized as part of the Kurdistan region since it was historically a part of their territory, contains a Kurdish majority, and has been administered as if part of the Kurdistan Regional Government territory since 1992. The current Iraqi

¹⁴⁷ See *supra* Part II.D.

¹⁴⁸ See *supra* Part III.C.

¹⁴⁹ See Andrew Lee Butters, *Hitting the Kurds From All Sides*, TIME, Dec. 27, 2007, <http://www.time.com/time/world/article/0,8599,1698549,00.html> (noting that the PKK is a militant group that finds refuge in the “lawless mountain region”).

¹⁵⁰ The government-sanctioned Kurdish peshmerga militias are unable to rid Northern Iraq of the PKK largely because the peshmerga are overstretched in Baghdad and Mosul trying to keep Arab insurgents from entering Kurdistan. *Id.*

¹⁵¹ *A time of peace: Improbable and exhilarating, self-government is back*, *supra* note 140.

¹⁵² *Does Independence Beckon?*, *supra* note 1.

¹⁵³ Peter W. Galbraith, *Kurdistan in Federal Iraq*, in THE FUTURE OF KURDISTAN IN IRAQ, at 276.

¹⁵⁴ *Id.*

Constitution calls for the people living in the Kirkuk region to determine for themselves whether they would like to be part of the Kurdistan region.¹⁵⁵ Even though settling border disputes will prove challenging, it is something that must be done regardless of whether or not the Kurdistan region becomes an independent state.

Lastly, the most important work left to be done is establishing protections for the minorities in the Kurdistan region. This can be done by building up the Justice Ministry of the KRG and making sure that the legal system is effective. The Kurdish Regional Government has taken the initial step of recognizing the importance of protecting human rights by creating a Ministry for Human Rights and appointing a Minister to lead the department.¹⁵⁶ Failure to convince the international community of its ability to protect the rights of minorities would be a fatal blow to international recognition.

E. Recognition of a Kurdish State is Dependent on Politics and Diplomacy

The legality of a potential Kurdish secession would ultimately be judged by whether or not the international community recognizes Kurdistan as a state. Although recognition is not an element of statehood, failure to be recognized would greatly impair Kurdistan's political and economic relations with other countries.¹⁵⁷ For example, the territory of Northern Cyprus, which is not recognized by any country other than Turkey, suffers harm to this day because of its illegal secession.¹⁵⁸ The EU does not have diplomatic

¹⁵⁵ *Does Independence Beckon?*, *supra* note 1. The Constitution specified that the referendum was to be held in December 2007 but it was postponed. There is great controversy about who gets to vote in the referendum. Iraqi Kurds believe that Arabs that moved to the region during Saddam Hussein's "Arabization" process should not have the right to vote. Even if one were to accept this position, it would be very difficult to determine who exactly came to Kirkuk as a result of the "Arabization" process. See Soner Cagaptay & Daniel Fink, *The Battle for Kirkuk: How to Prevent a New Front in Iraq*, WASH. INST. FOR NEAR EAST POLICY, Jan. 16, 2007, <http://www.washingtoninstitute.org/print.php?template=C05&CID=2552>.

¹⁵⁶ See Yousif Mohammad Aziz, Minister for Human Rights, <http://www.krg.org/articles/detail.asp?nr=136&lngnr=12&nr=11188&smap=04060100> (last visited Apr. 19, 2009).

¹⁵⁷ See Restatement, *supra* note 80, § 202 cmt. b (noting that statehood is not dependent on recognition by other states).

¹⁵⁸ In 1974, Turkish armed forces invaded and occupied a portion of Northern Cyprus. In November 1983, the Turkish Cypriot leadership, declared the occupied part of Cyprus to be an "independent state." Andreas J. Jacovides, *Cyprus: The International Law Dimension*, 10 AM. U. J. INT'L L. & POL'Y 1221, 1228 (1995). The U.N. Security Council condemned the unilateral declaration as well as all subsequent secessionist acts. It also declared them illegal and called for an immediate withdrawal of the Turkish troops. S.C. Res. 541, ¶2, U.N. Doc. S/RES/541 (Nov. 18, 1983) (noting that attempts to create a "Turkish Republic of Northern Cyprus" are "legally invalid"). The U.N. Security Council then called upon all states not to

relations with Northern Cyprus and refuses to trade with them. Moreover, the EU has punished Turkey for recognizing Northern Cyprus by using it as a reason to stall Turkey's EU accession negotiations.¹⁵⁹ In sum, although international recognition is not a requirement for statehood, it is a highly desirable goal for the Iraqi Kurds.

Kurdistan's chances of gaining international recognition will greatly increase if it works with the international community to gradually "earn" sovereignty. Montenegro, Northern Ireland, and Kosovo demonstrate that working with the international community is a powerful way to build up the political capital necessary to gain recognition from other states in the international community.¹⁶⁰ More specifically, Kosovo demonstrates that major international powers will recognize a newly formed state regardless of whether the former parent state recognizes the new country. With Kosovo, western countries recognized Kosovo even though Serbia, the parent state, strongly opposed recognition.¹⁶¹ This is an important precedent for a Kurdish state because it shows that the United States and other powerful countries could realistically recognize Kurdistan even if Iraq objects.

IV. THE UNITED STATES SHOULD SUPPORT KURDISH STATEHOOD

Given that the United States is a highly influential country and has invested tremendous resources in the Iraq war, gaining its support is especially important if the Iraqi Kurds hope to secure recognition from other states. Therefore, it is necessary to explore the interests of the United States regarding Kurdish statehood. Ultimately, Kurdish statehood is in the best interest of the United States and the United States should fully support Kurdish statehood.

A. *Kurdish State Would Allow the U.S. to Exit Iraq on a Positive Note*

With the exception of the Kurdish region, Iraq has been in great turmoil since the U.S. invasion in 2003. Sectarian violence has been a huge problem¹⁶² and the Iraqi central government has not been able to meet most of the political benchmarks set by the United States.¹⁶³ However, in the Kurdish territory of Iraq, the U.S. invasion and occupation has been largely

recognize the purported state set up by the secessionist actors, nor to facilitate—or in any way assist—the secessionist entity. S.C. Res. 550, ¶3, U.N. Doc. S/RES/550 (May 11, 1984). Turkey is the only state in the world that has accorded recognition to the illegal "Turkish Republic of Northern Cyprus." Jacovides, *supra*, at 1228.

¹⁵⁹ See EUR. PARL. DOC. A5-0091/2003 (Mar. 26, 2003).

¹⁶⁰ See *supra* Section III.C.

¹⁶¹ See Kulish & Chivers, *supra* note 128, at A10.

¹⁶² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 50–54.

¹⁶³ *Id.* at 4.

beneficial. The Kurds are enjoying more autonomy than ever before and have not been plagued by the sectarian violence found in the rest of the country.¹⁶⁴ Assisting the Kurds achieve statehood would allow the United States to exit Iraq on a positive note.

An independent Kurdish state would be a secular, self-supporting democracy, consistent with the values of the United States. Former President George W. Bush consistently has maintained that spreading democracy in Iraq and the rest of the Middle East is a major justification for the Iraq war and the United States' ongoing presence in Iraq.¹⁶⁵ Although spreading democracy is a commendable goal, it is unlikely that democracy can thrive in areas with high rates of sectarian violence. Supporting the independence of the Kurdish territory would allow democracy to take hold in a more stable region. Moreover, the Kurdish region has more experience with democracy than any other part of Iraq. There have been five parliamentary elections in the Kurdistan region since 1992.¹⁶⁶ If the United States is truly committed to spreading democracy in the Middle East, supporting Kurdish statehood is its best opportunity to see democracy thrive there.

The secular democracy found in the Kurdish region reflects American values. Secularism and freedom of religious expression are American values firmly embedded in the U.S. Constitution.¹⁶⁷ These values are shared by the Iraqi Kurds.¹⁶⁸ In contrast, Iraqi Shiites believe that Islam must be the basis for Iraqi law.¹⁶⁹ This belief has caused Iraq to "express[] reservations on the issue of freedom of religion."¹⁷⁰ Deeply rooted divisions about the proper role of religion in government will paralyze the effectiveness of any centralized government responsible for all of Iraq. An independent Kurdish state will not be burdened with fights over the role of religion in government.

Lastly, an independent Kurdish state would not be a financial burden on the international community. The large oil reserves in the Kurdistan region could support the country economically.¹⁷¹ The United States has committed itself to helping Kosovo function as an independent state through tremendous financial aid.¹⁷² In contrast, a Kurdish state could prosper inde-

¹⁶⁴ See *supra* notes 7 and 77–80 and accompanying text.

¹⁶⁵ See Tyler Marshall, *Bush's Foreign Policy Shifting*, L.A. TIMES, Jun. 5, 2005, at A1.

¹⁶⁶ *Does Independence Beckon?*, *supra* note 1.

¹⁶⁷ See U.S. CONST. amend. I.

¹⁶⁸ See McNulty, *supra* note 63, at 156.

¹⁶⁹ Galbraith, *supra* note 33, at 244.

¹⁷⁰ McNulty, *supra* note 63, at 156.

¹⁷¹ *Does Independence Beckon?*, *supra* note 1.

¹⁷² Kulish & Chivers, *supra* note 128, at A10 (explaining that the U.S. gave \$77 million in aid to Kosovo in 2007 and would raise that amount to roughly \$335 million in 2008).

pendently and would not burden the United States or the international community.

B. Newly Formed State Would Not Disrupt Region

Critics of Kurdish statehood maintain that a Kurdish state would cause chaos in the region and ultimately lead to more destruction of human life. This fear is based on the idea that the Kurds that live in the surrounding countries of Turkey and Iran will either want to join the newly created Kurdistan or cause rebellion in their own countries.¹⁷³ While there is always a chance that Kurds in Turkey and Iran will rebel with the formal recognition of a Kurdish state in Iraq, this fear seems overstated considering the fact that Kurds living in Turkey and Iran have not caused any major disruptions in the wake of the de facto Kurdish state that has existed in Iraq since 2003. Moreover, the United States and other powerful countries can take measures to insure that the recognition of a Kurdish state does not cause regional upheaval. For example, the United States can pressure Turkey to refrain from moving troops into the Kurdistan region and negotiate with the Kurdish Regional Government to condition its diplomatic recognition on a commitment to directly reign in terrorist groups, such as the PKK.¹⁷⁴

Even if the United States fails to prevent Kurdistan's neighbors from intervening, that does not justify a policy of continuing to deprive the Kurds of their own state. The level of disruption should be taken into account when weighing the benefits of allowing secession against the problems it could create.¹⁷⁵ It is very difficult for critics of Kurdish statehood to claim that the loss of the Kurdistan region would unduly disrupt Iraq. The oppression that the Kurds have suffered at the hands of Saddam Hussein and the refugee problem caused by the turmoil since the U.S. invasion have been far greater disruptions to the country than what would result from eventual Kurdish secession—especially considering the succession would really be a continuation of the de facto Kurdish state.¹⁷⁶ Given the amount of violence in Iraq since the U.S. invasion, it is hard to imagine that the result of gradually liberating the Kurdistan region would profoundly disrupt the country.

¹⁷³ See ELIZABETH FARRIS & KIMBERLY STOLTZ, THE BROOKINGS INSTITUTION, THE FUTURE OF KIRKUK: THE REFERENDUM AND ITS POTENTIAL IMPACT ON DISPLACEMENT 1 (2008), available at http://www.brookings.edu/~media/Files/rc/papers/2008/0303_iraq_ferris/0303_iraq_ferris.pdf.

¹⁷⁴ Many prominent U.S. leaders see Kurdistan as an ally and support protecting it. Secretary of State Hillary Clinton, Vice President Joe Biden, and former U.N. Ambassador Richard Holbrooke are among the prominent leaders who have called for the U.S. to protect Kurdistan militarily, following withdrawal from Iraq. Galbraith, *supra* note 88.

¹⁷⁵ See Ewald, *supra* note 55, at 401.

¹⁷⁶ See *Id.*

C. *Kurdish State Would be a Strong U.S. Ally in a Strategically Significant Region*

Even though the Middle East is vital to the economic interests of the United States—with its abundance of oil—the United States lacks allies near or among the Middle Eastern countries with large oil reserves. While many argue that Turkey and Saudi Arabia are strong allies, both of these countries have proven unreliable in the past. Turkey consistently has refused to help the United States when it is needed most—during times of war. Turkey did not allow the United States to use its military bases in Southern Turkey as a platform to attack Iraq from the north in March 2003.¹⁷⁷ This refusal is part of a history of non-cooperation with the United States. In 1979, Turkey refused the U.S. request to allow U-2 intelligence flights over Turkish airspace “unless Moscow agreed,”¹⁷⁸ and in May 1989, Turkey rejected an American request to inspect an advanced Soviet fighter plane flown by a Soviet defector to Turkey.¹⁷⁹ While Saudi Arabia was a key ally in the Gulf War in 1993, its government refused to allow American planes to carry out strikes from bases in Saudi Arabia in the 2003 Iraq war.¹⁸⁰

Given the lack of U.S. allies in the Middle East and the region’s importance to vital U.S. economic and security interests, an independent Kurdistan could be an important ally given its close proximity to Iran, Syria, and Iraq.¹⁸¹ The Kurds would be receptive to assisting the United States because Kurdistan would be a newly formed state and benefit tremendously from the security that comes along with being an ally of the United States.¹⁸² The Kurds might even allow the United States to build a military base in Kurdistan since the Kurds would benefit significantly from knowing that none of its neighbors would attack a country with a U.S. military base.¹⁸³ A military base, or at least use of Kurdish bases, would benefit the United States greatly. The U.S. could use the base to strike at al Qaeda in adjacent Sunni territories, limit Iran’s progress on nuclear weapons, and

¹⁷⁷ Michael M. Gunter, *The Kurds in Iraq*, 11 MIDDLE EAST POL’Y 106, 109 (2004).

¹⁷⁸ Bernard Gwertzman, *Turkey Would Bar U-2 Use of Airspace if Soviet Objected*, N.Y. TIMES, May 15, 1979, at A1.

¹⁷⁹ Stephen Engelberg, *Turkey Rebuffed U.S. Plea to Examine Defector’s MIG*, N.Y. TIMES, May 28, 1989, at A12.

¹⁸⁰ Stephen J. Hedges, *Military to Leave Saudi Arabia*, CHICAGO TRIBUNE, Apr. 30, 2003, at C1.

¹⁸¹ See Figure 1, *supra* Part I.

¹⁸² The security benefit of U.S. support to the Kurdistan Regional Government was evident “in July 2003, when the United States apprehended some 11 Turkish commandos in Sulaymaniya apparently seeking to . . . destabilize the de facto Kurdish government and state in northern Iraq.” Gunter, *supra* note 177, at 109.

¹⁸³ See Galbraith, *supra* note 88 (discussing the advantages of supporting an independent Kurdish state).

protect Israel.¹⁸⁴ In short, supporting Kurdish statehood would give the United States a tremendous ally in a strategically significant part of the world.

CONCLUSION

The case for Kurdish statehood in Iraq is quite compelling. At the end of World War I, the Kurds missed a great opportunity for statehood when the Allies redrew the borders in the Middle East.¹⁸⁵ Since being left without a state, the Kurds have suffered tremendously at the hands of others. Most notably, the Kurds were the victims of a genocide inflicted by Saddam Hussein during the Anfal campaign.¹⁸⁶ With the fall of Saddam Hussein, the Iraqi Kurds have an incredible opportunity to fulfill their dream of statehood.

Based on their common background, history, language, and culture, the Iraqi Kurds are a distinct group of people and, therefore, possess the legal right of self-determination.¹⁸⁷ Not only do the Iraqi Kurds possess the right of self-determination, but they could successfully secede from Iraq with broad support and minimal disruption to the region. Kosovo, Northern Ireland, and Montenegro illustrate that the process of “earned sovereignty” can successfully end sovereignty-based struggles in countries with tremendous histories of religious and ethnic turmoil. The similarity between the religious and ethnic conflicts in these countries and Iraq provides hope that the same approach could be followed in the Kurdish region of Iraq.

Kurdish statehood has the potential to be the best thing to emerge from the U.S. invasion of Iraq. The image of the U.S. has been severely tainted in the international community since the invasion of Iraq.¹⁸⁸ It is not often that foreign policy provides a country an opportunity to serve its own interest while simultaneously improving the lives of a people on the other side of the globe. Strong U.S. support of Kurdish statehood would help restore America’s image in the international community and garner the support of a new ally in a strategically significant area. The United States should not miss the chance to reward a people haunted by the pain and suffering of genocide and the opportunity to offer a beacon of hope to all future generations of humankind aspiring for democratic self-rule.

¹⁸⁴ *See id.*

¹⁸⁵ *See supra* notes 20–28 and accompanying text.

¹⁸⁶ *See supra* notes 33–35 and accompanying text.

¹⁸⁷ *See supra* Part II.A–C.

¹⁸⁸ *See, e.g.,* Nick Childs, *Israel, Iran Top “Negative List,”* BBC NEWS, Mar. 6, 2007, http://news.bbc.co.uk/2/hi/middle_east/6421597.stm (illustrating the negative image of the United States through polling by the BBC World Service).