

THE KURDISH QUEST FOR INDEPENDENCE AND THE LEGALITY OF SECESSION UNDER INTERNATIONAL LAW

INTRODUCTION

In September 2017, the Kurdish Regional Government in Iraq held a referendum asking its people if they wanted to become an independent state. Nearly 93 percent of voters answered yes.¹ This result was unsurprising. The Kurds, who are spread over numerous countries, are commonly described as the world's largest nation of people without a sovereign country to call their own.² Their quest for independence spans generations, and the vast majority of Iraqi Kurds desire statehood.³

Masrour Barzani, the son of the region's former president and the chancellor of the Kurdistan Region Security Council, said this of the referendum: "If you look at our history we have been mistreated throughout history . . . We as a nation have every right to self-determination."⁴

Iraq declared the referendum illegal.⁵ In the wake of the result, it also quickly seized large portions of Kurdish-held territory.⁶ Meanwhile, the

1 David Zucchino, *After the Vote, Does the Kurdish Dream of Independence Have a Chance?*, N.Y. TIMES (Sept. 30, 2017), <https://www.nytimes.com/2017/09/30/world/middleeast/kurds-iraq-independence.html?login=email&auth=login-email>. See generally Galip Dalay, *After the Kurdish Independence Referendum*, FOREIGN AFF. (Oct. 2, 2017), <https://www.foreignaffairs.com/articles/middle-east/2017-10-02/after-kurdish-independence-referendum> (explaining that there was a previous referendum in 2005, which also drew nearly unanimous support for independence; however, the 2005 referendum was led by civil society, whereas the 2017 referendum was formally held by the regional government, likely giving it greater significance and legitimacy); Marie Fantappie and Cale Salih, *The Politics of the Kurdish Independence Referendum*, FOREIGN AFF. (Sept. 19, 2017), <https://www.foreignaffairs.com/articles/2017-09-19/politics-kurdish-independence-referendum> (explaining that while Kurdish independence has been a struggle many years in the making, some Iraqi Kurds felt that the referendum was a calculated move by the Kurdish leaders to stay in power).

2 Russell Goldman, *Kurds Voted for Independence. Here's Who Else Has a Say.*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/world/middleeast/kurds-independence-referendum-explainer.html>.

3 Tim Arango, *For Iraq's Long-Suffering Kurds, Independence Beckons*, N.Y. TIMES (Sept. 9, 2017), <https://www.nytimes.com/2017/09/09/world/middleeast/iraq-kurdistan-kurds-kurdish-referendum-independence.html>.

4 *Id.*

5 David Zucchino and Margaret Coker, *Iraq Escalates Dispute With Kurds, Threatening Military Action*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/world/middleeast/kurdistan-referendum-iraq.html>.

6 Sergio Peçanha, *How the Kurdish Quest for Independence in Iraq Backfired*, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/interactive/2017/11/05/world/middleeast/kurd-independence-iraq-turkey-iran-syria-maps-backfired.html>.

international community provided little support for the Kurdish referendum, with Turkey, Iran, Syria, and even the United States condemning it outright.⁷ As of today, the Kurds' quest for independence is indefinitely stalled.⁸ These events provide a useful paradigm for renewing considerations as to how secessionist movements should be viewed under international law.

I. BACKGROUND: SELF-DETERMINATION AND SECESSION UNDER INTERNATIONAL LAW

Self-determination, broadly defined, is the “determination by the people of a territorial unit of their own future political status.”⁹ As a right of international law, it is highly codified. Article 1 of the Charter of the United Nations states the following: “The Purposes of the United Nations are . . . To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”¹⁰ Meanwhile, the United Nations' Declaration on the Granting of Independence to Colonial Countries and Peoples states: “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹¹ The right of self-determination is also “widely accepted as a norm of customary international law.”¹² Even more, “it is one of the essential principles of contemporary international law.”¹³ Given this, it

⁷ *Id.*

⁸ Renaud Mansour, *The Kurdish referendum backfired badly. Here's why.*, WASH. POST (Oct. 25, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/25/the-kurdish-referendum-backfired-badly-heres-why/?utm_term=.22616b92a168.

⁹ *Self-Determination*, MERRIAM WEBSTER'S DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/self-determination>.

¹⁰ U.N. Charter art. 1, ¶ 2.

¹¹ G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

¹² Lawrence Eastwood, Jr., *Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia*, 3 DUKE L. REV. 229, 346 (1993) (“The right of self-determination is widely accepted as a norm of customary international law. It could be easier to justify a secession right as an extension of the existing right of self-determination rather than attempting to develop the right of secession as an entirely new international law norm. States will likely show some reluctance to accept the extension of self-determination to include a secession right. As previously discussed, concerns over the possibility that a flood of secession efforts will result from the recognition of a secessionist right of self-determination have existed since President Wilson embraced the right shortly after World War. These fears have done much to ensure that no right of secession has ever been recognized.”).

¹³ East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 91, 102 (June 30) (declaring that “The principle of self-determination . . . is one of the essential principles of contemporary international

might seem that the Iraqi Kurds' right to democratically determine their own political status and to establish sovereignty for their stateless nation would be—legally speaking—an appropriate exercise of international law.

Yet, while the right of self-determination is uncontroversial as an abstract moral or legal concept, there is far less clarity in the scope of its application. This is likely due to the limiting effect of another fundamental principle of international law and modern sovereignty: territorial integrity.¹⁴ The importance and inviolability of territorial integrity are enshrined in Article 2 of the United Nations Charter.¹⁵ Moreover, the United Nations' Friendly Relations Declaration states, "Convinced in consequence that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter."¹⁶

Control over territory is of utmost importance to states.¹⁷ Thus, it is unsurprising that states—like Iraq—tend to be highly resistant when a constituency of their population seeks independence, which implies the partitioning of territory. In the case of Iraq, this would mean that Iraq would lose control over its Kurdistan region. States' paramount interest in maintaining their territory, as well as international law's corresponding support for the integrity of states' territory, therefore, provide limitations

law." This ICJ case followed allegations, among others, from Portugal that Australia had failed to respect the right of the people of East Timor to self-determination. *Id.* at 92.

14 See Jure Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6 ST ANTONY'S INT'L REV. 37, 38 (2010) ("[T]he principle of territorial integrity limits the right of self-determination...").

15 U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

16 G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970), at 122.

17 Marcelo G. Kohen, *SECESSION: INTERNATIONAL LAW PERSPECTIVES* 1, 6 (Marcelo G. Kohen ed., 2006) ("For States, respect of their territorial integrity is paramount. This is a consequence of the recognition of their equal sovereign character. One of the essential elements of the principle of territorial integrity is to provide a guarantee against any dismemberment of the territory. It is not only the respect of the territorial sovereignty, but of its *integrity*. This explains, for instance, why support for secessionist movements, or a colonial power's decision to keep part of the territory of a colony after its independence, can be considered violations of the territorial integrity of the State or the people concerned. It is beyond doubt that this rule plays a fundamental role in international relations and, as a mutual obligation, it requires all States to respect each other's territories. It is a guarantee against eventual *external* breaches, or, in other words, threats against the territorial sovereignty coming from abroad. But does this obligation also apply to internal secessionist movements?").

upon the right of self-determination and, by implication, limit secession as a means of exercising the right of self-determination.¹⁸

Practical considerations also restrict it. As President Bill Clinton once said, “[I]f every racial and ethnic and religious group that occupies a significant piece of land not occupied between others became a separate nation—we might have 800 countries in the world and have a very difficult time having a functioning economy or a functioning global polity. Maybe we would have 8,000—how low can you go?”¹⁹ This was echoed in the United Nation’s Agenda for Peace: “[I]f every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.”²⁰

Notably, such limitations upon the scope of self-determination do not apply in the colonial context. International law recognizes the right of colonial peoples to become independent.²¹ The United Nations’ Declaration on the Granting of Independence to Colonial Countries and Peoples asserts, “The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights . . . All peoples have the right to self-determination.”²² Indeed, the

18 Vidmar, *supra* note 14, at 38 (“[T]he principle of territorial integrity limits the right of self-determination. . .”).

19 Ved P. Nanda, *Self-Determination and Secession under International Law*, 29 DENV. J. INT’L & POL’Y 305, 306 (2001) (“President Clinton’s rhetoric notwithstanding, his message was that the right to self-determination, perhaps resulting in secession, was appropriate in Yugoslavia and Indonesia, both authoritarian societies, but not in a democratic Canada. A year earlier, the Supreme Court of Canada had responded to a Reference from the government of Canada on whether Quebec had the right to unilateral secession under Canadian constitutional law and international law”).

20 Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT’L L.J. 553, 567 (2010); *Cf.* Milena Sterio, *Self-Determination and Secession Under International Law: The New Framework*, 21 ILSA J. INT’L & COMP. L. 293, 293 (2015) (“Salman Rushdie, the famous novelist, wrote in ‘Shalimar the Clown’: ‘Why not just stand still and draw a circle round your feet and name that Selfistan?’ Any legal analysis of a group’s right to secede from its mother state involves a determination of whether the group is randomly—and thus illegitimately—drawing a circle around its claimed territory and calling it a ‘Selfistan,’ or whether the group has a legitimate claim to a defined territory at the expense of the mother state’s borders and territorial integrity. International law has been inadequate in addressing the legality of secessionist claims”).

21 Sterio, *supra* note 20 (“[International law] recognizes the right of colonial peoples to self-determination. . .”).

22 G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960).

right of colonial peoples to freely establish their own state has achieved *jus cogens* status.²³

However, given how few colonial peoples remain, this right has lost its utility for the large majority of modern self-determination movements.²⁴ Arguably, the emphasis that has been placed upon the *colonial* status of peoples, as a limited threshold requirement to justify secession, has had the effect of narrowing the right of self-determination and “disfranchising groups that lack the requisite colonial background.”²⁵ For peoples that are not living under foreign subjugation—but nevertheless, have been or are being oppressed—cannot rely upon the legal rights ascribed to colonial peoples.²⁶

23 Seshagiri, *supra* note 20 (“Somewhat ironically, given the paucity of remaining colonialist claims, the classical right of colonial self-determination has acquired *jus cogens* status.”). Cf. Thomas W. Simon, *Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo*, 40 GA. J. INT’L & COMP. L. 105, 122 (2011) (“Self-determination became embedded in international law in 1960 with the passage of the U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples. According to the declaration, all peoples under colonial rule have the right to ‘freely determine their political status.’ This right, however, has been interpreted narrowly in its application to colonial peoples.”).

24 Seshagiri, *supra* note 20.

25 *Id.* (“In particular, self-determination has been limited at international law to apply only to groups that constitute ‘peoples’ and whose territorial claims fit a particular colonial mold. In this manner, international law provided a limited window for colonized peoples to break free from their colonizers though not from colonially established borders. Somewhat ironically, given the paucity of remaining colonialist claims, the classical right of colonial self-determination has acquired *jus cogens* status. Moreover, the fact that few colonial regimes remain in place has done little to alter the content of self-determination. The result is to further narrow the exercise of a right to self-determination, disfranchising groups that lack the requisite colonial background. In effect, self-determination has been transformed from a legal right to a political rallying cry. The failure of self-determination doctrine to evolve reflects the international community’s deep hostility toward unilateral secession. In this respect both shared interests and self-interest play a role.”).

26 See Michael M. Gunter, *The Kurds in Iraq*, MIDDLE EAST POLICY COUNCIL (2004), <https://www.mepc.org/journal/kurds-iraq-0> (“No state on earth would support a doctrine that sanctions its own potential breakup. Thus, the international community has generally been hostile to any redrawing of the map that was not part of the decolonization process. Between Iceland’s secession from Denmark in 1944 and the collapse of communism in 1991, the only successful secessionist movements were in Singapore (1965), Bangladesh (1971) and Eritrea (1991). The collapse of colonialism after World War II and the recent disintegration of the Soviet Union and Yugoslavia in the early 1990s, led to two waves of state creation. However, there are no more empires to collapse and accordingly very few possibilities for further state creation today.”).

II. THE ISSUE: THE TENSION BETWEEN TERRITORIAL INTEGRITY AND THE RIGHT OF SELF-DETERMINATION

This tension between territorial integrity and the purported right of self-determination has created enormous issues. First among them is the difficulty of, or unwillingness to, clarify how the right of self-determination may be reconciled with the right of territorial integrity in the modern, post-colonial context. This is evidenced by the fact that international law is silent on a non-colonial peoples' right to secede through self-determination.²⁷

In February 2008—not unlike the Kurds in September 2017—Kosovo unilaterally declared independence from Serbia. This followed a bloody conflict in which Kosovars were ethnically cleansed and subjected to extensive violations of their human rights.²⁸ Following the Republic of Kosovo's declaration, the Government of Serbia filed a request before the United Nations, and the General Assembly posed to the International Court of Justice (the "ICJ") the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"²⁹

In its advisory opinion, delivered in July 2010, the ICJ declared that "General international law contains no applicable prohibition of declarations of independence—Declaration of independence of 17 February 2008 did not violate general international law."³⁰ Among other reasons, the ICJ supported their conclusion by looking at Security Council resolutions condemning similar declarations in the past. The Court concluded that these condemnatory resolutions were not relevant because they were passed in response to the unlawful use of force of the violation

27 Sterio, *supra* note 20 ("While [international law] recognizes the right of colonial peoples to self-determination, as well as any state's right to the respect of its territorial integrity, international law is silent on the issue of whether a non-colonized minority group ever accrues the positive right to remedially secede from its mother state.").

28 Rusif Huseynov and Taavi Linnus, *Remedial secession: A right to external self-determination as a remedy to serious injustices*, THE POLITICON (Nov. 1, 2017), <http://thepoliticon.net/essays/428-remedial-secession-a-right-to-external-self-determination-as-a-remedy-to-serious-injustices.html>.

29 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, at 407 (July 22) [hereinafter *Kosovo Unilateral Declaration of Independence Advisory Opinion*].

30 *Id.* at 406.

of a *jus cogens* norm, which differentiated the situation from that of the Kosovars.³¹

This advisory opinion could indicate that international law is moving toward an expanded view of secession through self-determination in the non-colonial context. Indeed, it has been suggested that the Kurds could have possibly relied upon this precedent to legitimize their own referendum.³² Indeed, Visar Ymeri, the former leader of the Self-Determination movement in Kosovo from 2015, has endorsed Kurdish independence.³³

It is unclear why the Kurds have not defended their referendum on the basis of the ICJ advisory opinion. However, even to do so would hardly strengthen the Kurds' claim of secession. The advisory opinion neither clarifies the right of secession nor reconciles the tension between self-determination and territorial integrity. Instead, the opinion was intentionally narrow, even explicitly refusing to address such issues. As the opinion stated further, "Issues relating to the extent of the right of self-determination and the existence of any right of 'remedial secession' are beyond the scope of the question posed by the General Assembly."³⁴ So

31 *Id.* at 437 ("Several participants have invoked resolutions of the Security Council condemning particular declarations of independence ... The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position.").

32 Milena Sterio, *Self-Determination and Secession Under International Law: The Cases of Kurdistan and Catalonia*, ASIL (Jan. 5, 2018), <https://www.asil.org/insights/volume/22/issue/1/self-determination-and-secession-under-international-law-cases-kurdistan> ("Kurds suffered years of oppression under the Saddam Hussein regime, when they had no meaningful rights to internal self-determination. Fourteen states submitted briefs to the International Court of Justice in its Advisory Opinion on Kosovo to argue in favor of Kosovar secession and independence, based on the argument that international law embraced a principle of remedial secession/external self-determination in instances of severe oppression by the mother state. While the Kurds could have relied on the Kosovo precedent during the Saddam regime, this type of external self-determination-through-remedial-secession argument is difficult to make today. Iraq is no longer ruled by Saddam Hussein, and the current Iraqi leadership has appeared willing to grant Kurdistan some form of autonomy.").

33 Nadia Riva, *Nobody has the right to deny the Kurds independence: Leader of Kosovo party*, KURDISTAN 24 (Aug. 14, 2017), <http://www.kurdistan24.net/en/news/b717e28e-4bb4-4a39-8cac-f4da40b68946> ("The Kurdish people have suffered for a long time. They are the biggest nation without a state yet," Ymeri noted, a point which has been stressed by proponents of Kurdish independence. "Nobody has the right to deny the Kurdish people their will of being free and living in freedom and peace in solidarity with the other peoples of the world.").

34 *Kosovo Unilateral Declaration of Independence Advisory Opinion*, at 405-06.

while the Court concluded that Kosovo's *declaration of independence* was not prohibited by general international law, it remains unclear what that means for a right of secession through self-determination. The right to declare is different from the right to actually secede. To date, the Republic of Kosovo's status as a legitimate state is incomplete, with only 111 member states of the United Nations recognizing Kosovo's status as an independent sovereign.³⁵

The persistent ambiguity of the legality of secession, partially resulting from the ICJ's decision to not address it in the Kosovo case, creates a gap in the international legal system that is dangerous. Peoples who may be subjected to great oppression, violence, and persecution from their sovereign governments lack the legal norms and framework by which to establish a new state that would be free from such oppression. Judge Bruno Simma of the ICJ—in his separate opinion—said as much, voicing his frustration with the majority's decision to not resolve this issue, and writing that the opinion was “unnecessarily limited and potentially misleading.”³⁶

As he further wrote, “The Court could have addressed [arguments on remedial secession] on their merits; instead, its restrictive understanding of the scope of the question forecloses consideration of these arguments altogether. The relevance of self-determination and/or remedial secession remains an important question in terms of resolving the broader dispute in Kosovo and in comprehensively addressing all aspects of the accordance with international law of the declaration of independence.”³⁷ Because of this uncertainty surrounding the legal right of secession as an expression

35 *Countries That Recognize Kosovo*, WORLD ATLAS (May 28, 2018), <https://www.worldatlas.com/articles/which-countries-recognize-kosovo-as-a-country.html>.

36 *Kosovo Unilateral Declaration of Independence Advisory Opinion* (separate declaration by Simma, J.) (“The Court’s interpretation of the General Assembly’s request is unnecessarily limited and potentially misleading. The Court’s approach reflects an outdated view of international law. The request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law. Yet, the Court’s embrace of ‘Lotus’ entails that everything which is not expressly prohibited carries with it the same colour of legality. The Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of toleration. By so limiting itself, the Court has reduced the advisory quality of the Opinion.”). See generally Samuel Ethan Meller, *The Kosovo Case: An Argument for a Remedial Declaration of Independence*, 40 GA. J. INT’L & COMP. L. 833, 860 (2011) (“Since the ICJ requires state cooperation to conduct its affairs, it has an interest in saying as little as possible so as not to overreach. Therefore, when it is presented with an issue involving a novel issue of international law, unclear sovereignty over territory, and conflicting state action, it would be more important, not less, to issue a narrow opinion.”).

37 *Kosovo Unilateral Declaration of Independence Advisory Opinion*, *supra* note 34.

of self-determination, peoples seeking independence cannot rely on it to legitimize their secession.

In the case of the Kurds in Iraq, where the powerful states are against the referendum and where Iraq is against Kurdish independence, the Kurds likely cannot establish their own state: the referendum is stillborn because it is not in the geopolitical interests of the relevant powers.³⁸ That practical reality, however, does not mean the Kurds do not deserve to be independent. Nor does it mean there should not be a legal framework, or the pervasion of new norms, to assist peoples like the Kurds in such a pursuit. At the moment, the Kurds have limited recourse under international law. This is problematic for a people who have long suffered oppression, and even genocide, at the hands of their Iraqi sovereigns.³⁹ Just as problematic is what it means for other peoples around the world who are currently being violently and systematically persecuted—or, perhaps, may be in the future.

III. APPROACH: THE RIGHT OF SELF-DETERMINATION MUST INCLUDE REMEDIAL SECESSION

Because groups of people should have the means to separate themselves from oppressive regimes regardless of geopolitical interests of the relevant powers, international law should include the right of remedial secession. Remedial secession is the notion that peoples being violently oppressed should, as a last resort, be entitled to secede as a lawful expression of self-determination.⁴⁰ So, while the Catalonians of Spain—who have not been violently persecuted—would not be entitled to secede under international law, other peoples who are being oppressed would be. The emphasis that the secession must be remedial carries with it a practical rationale: if all peoples were automatically entitled to their own territory, it could create numerous conflicts and undermine the international order.⁴¹

38 See Gunter, *supra* note 26 (“With the possible exception of Iraqi Kurdistan, Kurdish statehood is unlikely in the near future for several reasons. In the first place, Kurdistan (the land of the Kurds) is completely contained within already existing states—Turkey, Iran, Iraq and Syria. To create an independent Kurdistan would threaten the territorial integrity of these preexisting states. No state on earth would support a doctrine that sanctions its own potential breakup. Thus, the international community has generally been hostile to any redrawing of the map that was not part of the decolonization process.”).

39 See *infra* notes 67-83.

40 Vidmar, *supra* note 14, at 37.

41 Eastwood, *supra* note 12, at 348 (“The large number of ethnic and minority groups in the world . . . prevent secession from serving as a means for easing ethnic conflicts through a redrawing of

Secession that is remedial still involves the partitioning of territory and the risk of destabilization, but because it is reserved only for oppressed peoples, the number of peoples entitled to secede is far fewer. Thus, the effect upon the broader international order is smaller, as is the likelihood of a domino effect whereby any people anywhere could claim a country for their own.⁴²

Legal support for remedial secession draws from numerous areas. Some argue that justification for it can be found in the ‘safeguard clause’ of the United Nations’ Friendly Relations Declaration.⁴³ The clause states: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”⁴⁴ The argument is that a right of remedial secession can be inferred from this clause, and as this declaration reflects customary international law, that remedial secession should, therefore, be part of customary international law.⁴⁵ The declaration further states that:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in *compliance with the principle of equal rights and self-determination of peoples* as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.⁴⁶

national boundaries. A secession right based on the notion that ethnic or minority groups are automatically entitled to their own territory would threaten to internationalize many domestic group conflicts and could create new conflicts. In contrast, a right of secession available only to oppressed groups when a majority of persons within a particular territory favors separation could provide a permanent political remedy to at least some groups without undermining international order or undemocratically ‘encapsulating’ ethnic majorities in newly independent states.”)

42 *Id.*

43 Simon, *supra* note 23, at 122 (“The so-called safeguard clause in the Declaration on Friendly Relations provides one legal argument for a remedial right of secession.”).

44 G.A. Res. 26/25 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970).

45 Simon, *supra* note 23, at 122 (“The Declaration on Friendly Relations has been found to reflect customary international law... The argument is that although the Declaration on Friendly Relations does not explicitly grant a right to secession, it does infer such a right.”).

46 G.A. Res. 26/25, *supra* note 43 (italics added).

Some scholars have read this clause to suggest that the right of territorial integrity and political unity is contingent upon a sovereign's compliance with the principles of equal rights and self-determination.⁴⁷ Therefore, if a state is not respecting these principles, a people are entitled to secede remedially. Others have challenged this reading of the declaration, asserting that the declaration was not drafted with such authorizations in mind, and arguing that such a reading would be inconsistent with the rest of the declaration and that states did not intend for that to be the effect.⁴⁸

At least one other scholar, meanwhile, views remedial secession as an appropriate extension of John Locke's social contract theory.⁴⁹ That if the sovereign government breaches the trust of its people in such an egregious way, the people, as Locke expressed, have a right to liberty from that government.⁵⁰ It is worth noting that such a rationale has justified state

47 Vidmar, *supra* note 14, at 38 ("While the principle of territorial integrity limits the right of self-determination, it is precisely the elaboration of this principle in the Declaration on Principles of International Law which gives rise to the remedial secession theory... An inverted reading of this provision would suggest that a state which does not possess 'a government representing the whole people belonging to the territory without any distinction' is not entitled to invoke the principle of territorial integrity when limiting the right of self-determination. Still, it is questionable whether remedial secession has enough support in legal doctrine and state practice to be considered an actual entitlement under international law."); *See also* Simon, *supra* note 23, at 122 ("Documents, such as the 1970 U.N. General Assembly Resolution entitled 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations' (Declaration on Friendly Relations), indicate a willingness of the international community to extend the idea of peoples beyond the colonial context.").

48 Kohen, *supra* note 17, at 10 ("A very controversial issue debated at some length in this book is the scope of the so-called 'safeguard clause' embodied in the Friendly Relations Declaration and repeated in subsequent instruments. For some of the contributors...the interpretation of this clause leads to the legal acceptance of a 'remedial secession', at least as a measure of last resort...Like other authors in this book (e.g., Tancredi, Corten, and Christakis), the editor does not share this view which, according to him, is not in conformity with the rest of the Declaration's chapter on self-determination. The 'safeguard clause' was originally drafted with situations such as South Africa and Rhodesia in mind, without any intention to extend recognition to any 'secession' rights to the majority of the South African and Zimbabwean peoples, as victims of racist regimes.").

49 Allen Buchanan, *Theories of Secession*, 26 PHIL. & PUB. AFF. 31, 35 (1997) ("The recognition of a remedial right to secede can be seen as supplementing Locke's theory of revolution and theories like it. Locke tends to focus on cases where the government perpetrates injustices against 'the people,' not a particular group within the state, and seems to assume that the issue of revolution arises usually only when there has been a persistent pattern of abuses affecting large numbers of people throughout the state. This picture of legitimate revolution is conveniently simple: When the people suffer prolonged and serious injustices, the people will rise.").

50 Charlotte Mueller, *Secession and self-determination - Remedial Right Only Theory scrutinised*, 7 POLIS 283, 287-88 (2012). Mueller highlights, however, that unlike John Locke's social contract theory, the remedial right of secession pertains to situations concerning a sub-state region, rather than the nation in its entirety. Although she does not address this issue, the notion that remedial secession concerns a sub-state region raises issues about how broadly international law should define

formation in other contexts, including the United States.⁵¹ Further still, others justify remedial secession under moral philosophy: that if sovereign governments persistently violate peoples' most basic human rights and the only alternative to suffering this is secession, then secession becomes a morally permissible, if not the only, recourse.⁵²

However, the strongest legal argument in favor of integrating remedial secession into the right of self-determination is that remedial secession is the logical and natural evolution to the well-established and *jus cogens* right of colonial self-determination. If international law deemed—as it did—that colonial peoples, undeserving of foreign subjugation, had an indisputable right to independence and sovereign territory of their own, why would that same rationale not apply in the post-colonial context to peoples who are oppressed by their own governments? Judge Cançado Trindade of the ICJ, in his separate opinion in the Kosovo case, said as much:

Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it. The principle of self-determination has survived decolonization, only to face nowadays new and violent manifestations of systematic oppression of peoples. International administration of territory has thus emerged in UN practice (in distinct contexts under the UN Charter, as, for example, in East Timor and in Kosovo). It is immaterial whether, in the framework of these new experiments, self-determination is given the qualification of 'remedial' or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under

'people.' It is well-established that peoples generally have a right to self-determination under international law. However, it is more ambiguous as to whether, for example, the Kurds in Iraq would constitute a 'people' in this context.

51 *The Declaration of Independence and Natural Rights*, CONSTITUTIONAL RIGHTS FOUNDATION (2001), <https://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html> ("Most scholars today believe that Jefferson derived the most famous ideas in the Declaration of Independence from the writings of English philosopher John Locke. Locke wrote his *Second Treatise of Government* in 1689 at the time of England's Glorious Revolution, which overthrew the rule of James II . . . Locke concluded, if a government persecutes its people with 'a long train of abuses' over an extended period, the people have the right to resist that government, alter or abolish it, and create a new political system.").

52 Seshagiri, *supra* note 20, at 568-69 (2010) ("Broadly stated, the theory is as follows: 'Individuals are morally justified in defending themselves against violations of their most basic human rights. When the only alternative to continuing to suffer these injustices is secession, the right of the victims to defend themselves voids the state's claim to the territory and this makes it morally permissible for them to join together to secede.'").

systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.⁵³

The Supreme Court of Canada, in their case on Quebec secession, demonstrated that they were similarly open to equating the self-determination rights of colonial peoples to that of non-colonial peoples who are oppressed. As the opinion states, “a right to secession only arises under the principle of self-determination of people at international law where ‘a people’ is governed as part of a colonial empire; where ‘a people’ is subject to alien subjugation, domination or exploitation; and *possibly* where ‘a people’ is denied any meaningful exercise of its right to self-determination *within the state of which it forms a part.*”⁵⁴

During the 2010 ICJ Kosovo case, some voiced sentiments similar to those expressed by the Supreme Court of Canada. The Netherlands, for example, stated:

There has been a serious breach of the obligation to respect and promote the right to self-determination . . . It is, therefore, the opinion of the Kingdom of the Netherlands that the answer to the question should be that the proclamation of the independence of Kosovo on 17 February 2008 is in accordance with international law or, alternatively, that international law neither authorizes nor prohibits the proclamation.⁵⁵

Germany also supported Kosovo’s right to self-determination, stating that “[t]he facts preceding the Kosovo Declaration of Independence . . . reveal a clear case of prolonged and severe repression and denial of all internal self-determination.”⁵⁶

53 *Kosovo Unilateral Declaration of Independence Advisory Opinion*, at 593 (July 22) (separate opinion by Trindade, J.).

54 Reference re Secession of Quebec [1998] 2 S.C.R 217, 222 (italics added). This case was a judgment of the Supreme Court of Canada regarding the legality of a unilateral secession from Canada by Quebec. The Court considered the Constitution of Canada, but also the application of international law and Quebec’s right to unilaterally secede in accordance with that. On the constitutional inquiry, the Court held that a constitutional amendment would be required to allow Quebec to secede. On the question of international law, which is the more relevant here, the Court held that Quebec could not unilaterally secede, but did call for secession negotiations following a referendum. *Id.*

55 *Kosovo Unilateral Declaration of Independence Advisory Opinion*, at 12-13 (Written Statement of the Kingdom of the Netherlands).

56 *Kosovo Unilateral Declaration of Independence Advisory Opinion*, at 35 (Written Statement of Germany). See generally *Kosovo Unilateral Declaration of Independence Advisory Opinion* (Written Proceedings) (Reactions from other member states were varied. Some states argued that the

That colonial peoples have the right under international law to establish their own sovereign territories is a compelling and logically consistent reason as to why oppressed peoples deserve the same. Indeed, if colonial self-determination is a *jus cogens* right, it follows perhaps that it should be a *jus cogens* right for non-colonial oppressed peoples as well. However, while there should be a legal right to remedial secession in international law on the basis of the precedent rights provided to colonial peoples, even this conception of secessionist rights may be too narrow. This becomes evident when the remedial secessionist model is applied to the Kurdish situation in Iraq.

IV. APPLYING THE REMEDIAL SECESSION MODEL TO THE KURDS IN IRAQ

A. *The Current Status of the Iraqi Kurds*

Proponents of remedial secession have often argued that a legal right of secession should exist as a last resort for a people who are being presently oppressed.⁵⁷ The secessionist movement undertaken by the Kurds in Iraq, however, complicates this rather narrow view. This is because it is not evident that the Kurds are *currently* oppressed to a sufficient degree despite arguably still deserving a sovereign state of their own. Iraqi Kurds can certainly argue that they are being oppressed by the federal government of Iraq, but their claims are weaker when compared to, for example, the mass atrocities in Kosovo. As will be explained here, the Kurds' argument is essentially twofold: that the federal government has persistently disregarded their constitutional rights, and that it has failed to provide security to the Kurdistan region.

In 2005, after the death of Saddam Hussein and the fall of his Ba'athist regime, Iraq adopted a new constitution. Article 140 of the constitution calls for "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."⁵⁸ Kirkuk is an Iraqi city, control of which has long been disputed by the Kurds and the federal government. Not only are oil fields

Kosovo's declaration of independence was not prohibited by international law, but explicitly or implicitly declined to assert that Kosovo had the right to self-determination or secession. Other states asserted that Kosovo's declaration was contrary to international law for it violated Serbia's territorial integrity or because the right of self-determination applies only to colonies, of which Kosovo never was).

⁵⁷ Vidmar, *supra* note 14, at 37.

⁵⁸ CONSTITUTION OF IRAQ Oct. 15, 2005, art. 140.

abundant in Kirkuk, but many Kurds regard the land as a symbol of their people to a degree that is similar to the way in which Muslims, Christians, and Jews revere Jerusalem.⁵⁹ Despite the economic and cultural significance of the city and the constitutional promise to hold a referendum by the end of 2007, no such referendum has ever occurred. In 2010, then-Iraqi Prime Minister Nouri al-Maliki went as far as to say that Article 140 could not be implemented.⁶⁰ Even more, although the Kurds exercise de facto control over Kirkuk, the federal government recently deployed its military forces and took the city.⁶¹ In 2017, Masoud Barzani, who was president of the Iraqi Kurdistan Region from 2005 to 2017, cited the failure to implement Article 140 as one reason for independence.⁶²

Another article of the constitution, 112, is also heavily contested. Article 112 states that the “federal government, with the producing governorates and regional governments, shall undertake the management

59 *The Other Jerusalem*, THE ECONOMIST (April 4, 2007), <https://www.economist.com/middle-east-and-africa/2007/04/04/the-other-jerusalem> (“...for Kirkuk’s Kurds and their brethren in the autonomous Kurdish region to the north, [Kirkuk] is about far more than just oil. Kirkuk is a symbol, they say, of everything Kurdish: their people, their land, their history. They say they can be reconciled with their Arab compatriots, both Sunni and Shia, only if Saddam Hussein’s ‘Arabisation’ campaign—the settlement of tens of thousands of Arabs in Kirkuk during his three decades in power—is reversed.”).

60 Scott A. Anderson, *The constitutional context for Iraq’s latest crisis*, THE BROOKINGS INST. (Nov. 7, 2017) <https://www.brookings.edu/blog/markaz/2017/11/07/the-constitutional-context-for-iraqs-latest-crisis/> (“By 2010, then-Iraqi Prime Minister Nouri al-Maliki was publicly suggesting that Article 140 is ‘drafted in such a way that it cannot be implemented,’ necessitating a constitutional amendment. . . . But for Iraqi Kurds—who widely believed that the results of the referendum would support making the disputed territories part of the Kurdistan Region—this apparent willingness to ignore Article 140 only cast further doubt over the legitimacy of the Iraqi government’s own claims of constitutional authority.”).

61 *Id.* (“An explicit response to the Kurdistan Regional Government (KRG)’s recent decision to hold a referendum on independence, the offensive quickly recaptured the contested city of Kirkuk, which—like much of the disputed territories—had been under the KRG’s de facto control for several years. This in turn severed the KRG’s access to the significant oil wealth around Kirkuk, dealing a serious blow to any hopes of secession.”). See also Alia Chughtai, *Territory lost by Kurds in Iraq*, AL JAZEERA (Nov. 1, 2017), <https://www.aljazeera.com/indepth/interactive/2017/10/territory-lost-kurds-iraq-171031133441429.html> (“Kurds in northern Iraq voted in a non-binding secession referendum on September 25. Since then, they have lost 40 percent of the area they had taken in the fight against ISIL, as Iraqi forces have moved in.”).

62 Masoud Barzani, *The time has come for Iraq to make its choice on independence*, WASH. POST (June 28, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/06/28/the-time-has-come-for-iraqi-kurdistan-to-make-its-choice-on-independence/?fbclid=IwAR0vkmFbXqV5YPiGqP4CG7U4RauJ61LFeuD3sfWXEI-wauOTdyIKXeLWt_g&noredirect=on&utm_term=.72fe15a91feb (“Fourteen years later, Baghdad has failed to implement key provisions of that constitution, and we have good reason to believe that it never will. This failure of the political system is also responsible for the drastic deterioration of relations between Sunnis and Shiites that led to the rise of the Islamic State, with disastrous consequences for all Iraqis, including the Kurds.”).

of oil and gas extracted from *present* fields”⁶³ Pursuant to the language of Article 112, the Kurdistan Regional Government (KRG) has argued that the federal government can only manage the oil fields in operation at the time of the constitution’s adoption. Therefore, it is unconstitutional for the Iraqi government to interfere with KRG’s new oil and gas projects.⁶⁴

Alongside these constitutional arguments is the claim that the Iraqi government’s failure or unwillingness to adequately protect the Kurdistan region is grounds for independence. As Barzani further wrote, “When the Islamic State attacked Kurdistan in 2014...the Iraqi government refused to give Kurdistan its constitutionally mandated share of the federal budget or to provide our soldiers (known as the peshmerga) with weapons.”⁶⁵ In the wake of the Islamic State’s invasion, Iraqi security forces also abandoned previously disputed areas, leaving Kurdish Peshmerga soldiers to undertake much of the fighting.⁶⁶ As Barzani stated in 2017, the independence of Kurdistan is necessary to prevent the “deterioration of the security of the whole region.”⁶⁷

Thus, the KRG’s frustration toward the Iraqi government is based upon disputed territory, disputed oil and gas contracts, and claims that Iraq has not adequately protected the region from invading forces. The remedial secession model calls for an examination as to whether a people are being systematically oppressed by their government. The squabbles between the Kurdistan Regional Government and the Iraqi federal government may not, therefore, rise to the level of oppression required by the current conception of remedial secession. As such, according to the current conception of remedial secession, Iraqi Kurds may not be lawfully entitled to secede.

This note, however, proposes that the current scope of remedial secession may be too narrow. The remedial secession model largely

63 CONSTITUTION OF IRAQ, *supra* note 58 (emphasis added).

64 Anderson, *supra* note 60. Conversely to the position taken by the Kurdistan Regional Government, the Iraqi federal government has maintained that, pursuant to Article 112, the management of oil and gas falls under the responsibility of the federal government. Further increasing the tension is the fact that the Kurdistan Regional Government has pursued contracts for oil and gas in these disputed areas. *Id.*

65 Barzani, *supra* note 62.

66 *Iraq Kurdistan independence referendum planned*, BBC (July 1, 2014), <https://www.bbc.com/news/world-middle-east-28103124>.

67 Masoud Barzani, *Why It’s Time for Kurdish Independence*, FOREIGN POLICY (June 15, 2017), <https://foreignpolicy.com/2017/06/15/masoud-barzani-why-its-time-for-kurdish-independence/>.

focuses upon current conditions. Instead, remedial secession should perhaps take into consideration historical patterns of systematic oppression, as well as the propensity for future oppression. When such an analysis is applied to the Kurds in Iraq, their claim for independence becomes far more compelling.

B. A Pattern of Oppression

The Kurds are not a post-colonial people seeking independence in the same fashion as, for example, India seeking independence from the United Kingdom after World War II. The Kurds have, however, suffered from long periods of colonization.⁶⁸ They lived under the rule of the Ottoman Empire until the empire's dissolution after the Great War.⁶⁹ During President Woodrow Wilson's Fourteen Points address, in which he outlined principles for peace, he stated that the nationalities formerly under Ottoman rule—which included the Kurds—should be given the opportunity for autonomous development.⁷⁰ The 1920 Treaty of Sèvres, which followed the defeat of the Ottoman Empire after the war, also provided for a Kurdish state.⁷¹ Hopes for Kurdish post-colonial independence, however, were dashed by the 1923 Treaty of Lausanne, which overrode the failed Treaty of Sèvres and did not include the creation of a Kurdish state.⁷²

68 Thomas Hale, *A Short History of the Kurds*, FIN. TIMES (Oct. 17, 2014), <https://www.ft.com/content/879661d7-d33e-3d58-85f3-862d4074121a>.

69 *Id.*

70 President Woodrow Wilson, The Fourteen Points (Jan. 8, 2018) (transcript available at OUR DOCUMENTS, <https://www.ourdocuments.gov/doc.php?flash=true&doc=62&page=transcript>) (“The Turkish portion of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development...”). See also Rick Noack, *The long, winding history of American dealings with Iraq’s Kurds*, WASH. POST (Oct. 17, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/10/17/the-long-winding-history-of-american-dealings-with-iraqs-kurds-2/?noredirect=on&utm_term=.596afe57e92c (“Iraq itself is the product of three old Ottoman vilayets, or provinces, that were subsequently claimed by British mandate after the end of World War I and the fall of the Ottoman Empire. At the time, President Woodrow Wilson supported the idea of autonomy for non-Turks in the Ottoman Empire. But the Kurds were to be disappointed: denied their own self-determination, their lands were split among Iran, Turkey and Iraq.”).

71 *Who are the Kurds*, BBC (Oct. 31, 2017), https://www.bbc.com/news/world-middle-east-29702440?fbclid=IwAR3yb_iKLyFhevvcwfgwtmxl89VueoL1nr1g_aABL95tMuOLU5K1ilfzS7xk.

72 *Id.*

The Kurds then came under the control of another colonial state as the Kingdom of Iraq under British Administration was formed in 1922.⁷³ While Iraq oversaw local governance, Britain retained control over foreign and military affairs.⁷⁴ Once again, the Kurds found themselves subjected to another power's rule. During this time, the Kurds continued to seek autonomy, undertaking several revolts against their rulers.⁷⁵ After Britain relinquished control, the Kingdom of Iraq became a sovereign country in 1932.⁷⁶ By the 1970s, Saddam Hussein had risen to power. It was during this time that he began to 'Arabize' Kurdish territory in northern Iraq, diluting the ethnic composition of the territories by importing large Arab communities and forcing out many Kurds. By the end of the decade, Iraq had forcibly resettled many thousands of Kurds.⁷⁷

This, however, was only the beginning. During the 1980s, Saddam Hussein had become impatient with the Kurdish rebellions and decided the best way to deal with the issue was to "stamp out Kurdish life."⁷⁸ Between 1987 and 1988, in what was known as the Anfal Campaign, Iraqi forces destroyed thousands of Kurdish villages and killed nearly 100,000 Kurds, many of whom were unarmed and who were bussed to remote areas where they were gunned down in mass executions.⁷⁹ Hussein also ordered the use of chemical weapons upon the Kurdish villages. One attack, on the Kurdish town of Halabja, was particularly horrific:

73 See PHEBE MARR, *THE MODERN HISTORY OF IRAQ* 26 (2012) ("The mandate awarded to Britain by the League of Nations had specified that Iraq should be prepared for self-government under British tutelage but left the means and mode to the mandatory power. The British decided to express the mandatory relationship by a treaty, deemed the most imaginative way to neutralize Iraqi opposition...in October 1922 the Council of Ministers ratified the treaty. The treaty was the backbone of Britain's indirect rule.").

74 *British Relations with Iraq*, BBC (Feb. 10, 2002), https://www.bbc.co.uk/history/recent/iraq/britain_iraq_03.shtml.

75 *Iraqi Kurdistan profile - timeline*, BBC (Oct. 31, 2017), <https://www.bbc.com/news/world-middle-east-15467672>.

76 John E. Woods et al., *Iraq*, Encyclopedia Britannica (Jan. 29, 2020), <https://www.britannica.com/place/Iraq/The-revolution-of-1968>.

77 SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 175 (2002) ("Hussein promptly ordered the 4,000 square miles of Kurdish territory in northern Iraq Arabized. He diluted mixed-race districts by importing large Arab communities and required that Kurds leave any areas he deemed strategically valuable. Beginning in 1975 and continuing intermittently through the late 1970s, the Iraqis established a 6-12-mile-wide 'prohibited zone' along their border with Iran. Iraqi forces destroyed every village that fell inside the zone and relocated Kurdish inhabitants to the *mujamma'at*, large army-controlled collective settlements along the main highways in the interior. Tens of thousands of Kurds were deported to southern Iraq.").

78 *Id.* at 171.

79 *Id.* at 172.

Halabja quickly became known as the Kurdish Hiroshima. In three days of attacks, victims were exposed to mustard gas, which burns, mutates DNA, and causes malformations and cancer; and the nerve gases sarin and tabun, which can kill, paralyze, or cause immediate and lasting neuropsychiatric damage. Doctors suspect that the dreaded VX gas and the biological agent aflatoxin were also employed. Some 5,000 Kurds were killed immediately. Thousands more were injured.⁸⁰

As bad as this attack was, it was only one of at least forty of such chemical assaults.⁸¹ By the end of the campaign, Iraqi forces had killed as many as 182,000 Kurds.⁸² Human Rights Watch eventually declared that Iraq had committed genocide upon the Iraqi Kurds.⁸³ Despite this, the Kurds staged another independence rebellion in the 1990s, which was yet again crushed.⁸⁴

This is merely a brief overview of the Kurds' treatment in Iraq. In the space of a century, the Kurds have lived under the rule of both colonizers and authoritarian regimes. They have been promised and then denied independence. They have made nearly countless attempts at gaining autonomy, all of which have failed.⁸⁵ They have suffered a genocide. Their experience is illustrative of the notion that, perhaps, the scope and lawfulness of remedial secession should not only factor into consideration present conditions but also rest upon remedying systematic, historical abuse. Those who wish to evaluate the merits of the Kurds' right to secede

80 *Id.* at 189.

81 *Id.*

82 See Dave Johns, *The Crimes of Saddam Hussein*, PBS (Jan. 24, 2006), https://www.pbs.org/frontlineworld/stories/iraq501/events_anfal.html.

83 *Genocide in Iraq*, HUMAN RIGHTS WATCH (July 2008), <https://www.hrw.org/reports/1993/iraqanfal/> (“[This report] concludes that...the Iraqi regime committed the crime of genocide...While it is impossible to understand the Anfal campaign without reference to the final phase of the 1980-1988 Iran-Iraq War, Anfal was not merely a function of that war. Rather, the winding-up of the conflict on Iraq's terms was the immediate historical circumstance that gave Baghdad the opportunity to bring to a climax its longstanding efforts to bring the Kurds to heel. For the Iraqi regime's anti-Kurdish drive dated back some fifteen years or more, well before the outbreak of hostilities between Iran and Iraq). See also POWER, *supra* note 74, at 244 (“For the first time in its history, Human Rights Watch found that a country had committed genocide. Often a large number of victims is required to help show an intent to destroy a group. But in the Iraqi case the confiscated government records explicitly recorded Iraqi aims to wipe out rural Kurdish life.”).

84 A Chronology of U.S.-Kurdish History, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/saddam/kurds/cron.html>.

85 *Iraqi Kurdistan profile - timeline*, BBC (Oct. 31, 2017), <https://www.bbc.com/news/world-middle-east-15467672>.

should look beyond the nature of the Kurds' relationship with the current Iraqi federal government and instead determine whether the Kurds, due to generational oppression, are a people deserving of and in need of a secure, sovereign territory of their own.

Directly related to this is the notion that peoples, such as the Kurds, should have the right to secede so that the genocide, subjugation, and oppression of the past are not inflicted in the future. History has a tendency to repeat itself. As the right of remedial secession should account for past abuse, so it should also look ahead.

C. *The Likelihood of Future Oppression*

The Iraqi federal government's response to the 2017 Kurdish referendum indicates potential warning signs for the future. After the vote, then-Prime Minister Haider al-Abadi called for the cancellation of the referendum.⁸⁶ The government subsequently called the referendum illegal,⁸⁷ and Iraq's Supreme Federal Court ruled the vote unconstitutional and its results void.⁸⁸ Meanwhile, the federal government imposed retaliatory sanctions, banned international flights to the Kurdistan Region,⁸⁹ and forcibly seized the city of Kirkuk and other territories that the Kurds had held since the Islamic State's invasion.⁹⁰ The federal

⁸⁶ *Iraqi PM calls on Kurdistan to cancel referendum, start dialogue*, EFE (Sept. 27, 2017), <https://www.efe.com/efe/english/portada/iraqi-pm-calls-on-kurdistan-to-cancel-referendum-start-dialogue/50000260-3391820>.

⁸⁷ Zucchini and Coker, *supra* note 5.

⁸⁸ Ahmed Rasheed and Raya Jalabi, *Iraqi court rules Kurdish independence vote unconstitutional*, REUTERS (Nov. 20, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-kurds/iraqi-court-rules-kurdish-independence-vote-unconstitutional-idUSKBN1DK0Q6>. The Federal Court's ruling that the referendum was unconstitutional and that the Kurdistan Regional Government should cancel the referendum's results was final. The opinion was final and is not subject to appeal. *Id.* See also *Iraq Supreme Court rules Kurdish referendum unconstitutional*, BBC (Nov. 20, 2017), <https://www.bbc.com/news/world-middle-east-42053283> ("The Iraqi Supreme Court has ruled that a referendum on Kurdish independence was unconstitutional. . . The head of Iraq's autonomous Kurdistan Regional Government, Nechirvan Barzani, called the ruling "unilateral", but said he would not challenge it.").

⁸⁹ Maher Chmaytelli, *Iraqi Kurds face more sanctions after calling elections*, Reuters (Oct. 3, 2017), <https://www.reuters.com/article/us-mideast-crisis-kurds-referendum-elect/iraqi-kurds-face-more-sanctions-after-calling-elections-idUSKCN1C814N>.

⁹⁰ Maher Chmaytelli and Mustafa Mahmoud, *Iraqi forces seize oil city Kirkuk from Kurds in bold advance*, REUTERS (Oct. 15, 2017), <https://www.reuters.com/article/us-mideast-crisis-iraq-kurds-kirkuk/iraqi-forces-seize-oil-city-kirkuk-from-kurds-in-bold-advance-idUSKBN1CK0XL> ("Iraqi government forces captured the major Kurdish-held oil city of Kirkuk on Monday, responding to a Kurdish referendum on independence with a bold lightning strike that transforms the balance of power in the country.").

government also rejected the Kurds' offer to freeze the referendum results.⁹¹

Iraq's retributive actions indicate that the Kurds remain vulnerable to oppression, violence, and discriminatory treatment in the future; that the pattern of persecution the Kurds have faced for more than a century may continue. Just as the historical record should be included in the remedial secession calculus, so perhaps should the propensity for future oppression. Unfortunately, it is likely that the international community, already skeptical of remedial secession, would be reluctant to broaden its scope.

CONCLUSION

While self-determination—the right of a people to determine their own political future—is universally acknowledged under international law, the right to secede is ill-defined and inconsistently applied. This lack of clarity dangerously restricts the ability of stateless peoples to free themselves from oppressive regimes. For this reason, international law should recognize the right of remedial secession. As an expression of self-determination, it should be lawful for oppressed peoples to remedy their situation through secession, and the international community should regard those new states as legitimate. This is consistent with and supported by the *jus cogens* right of independence widely ascribed to post-colonial peoples.

Moreover, the right of remedial secession should reflect not only an evaluation of present conditions but the broader experience of a people. This includes evaluations as to the nature of past oppression and the likelihood that such oppression may again occur in the future. Looking both to the past and the future is consistent with the principles that underlie remedial secession and may provide fairer outcomes for stateless peoples, such as the Kurds, who deserve—and who have long dreamed of—freedom.

*Dylan Evans**

⁹¹ *Iraq Supreme Court rules Kurdish referendum unconstitutional*, BBC (Nov. 20, 2017), <https://www.bbc.com/news/world-middle-east-42053283>.

* Executive Articles Editor, *Washington University Global Studies Law Review*; Juris Doctor Candidate (2020), Washington University School of Law; Masters of Arts (Honours) (undergraduate degree) in International Relations (2016), University of St Andrews.