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Right to Self-determination: Iraqi Kurdistan Region and Kosovo as A Case Study

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Abstract:

The Iraqi Kurdistan region and Kosovo have their own struggles in exercising their right to self-determination. Both regions became victims as a result of trying to achieve independence. However, Kosovo's independence was successful, while the Kurdistan region's attempt for independence was not. It must be assumed that there must be reasons for the failure of independence in the Iraqi Kurdistan region, as well as Kosovo's successful independence. The international community's interests, in both cases, have to be explored as well. In other words, what are the reasons for the failure of the Kurdistan region's independence and the success of Kosovo independence? Further, this paper aims at defining self-determination and then providing a historical review of the Iraqi Kurdistan region, Kosovo's struggle for achieving the right to self-determination, and also a precise analysis of both cases. The methodology used in this paper is pure library research; focusing mainly on secondary sources. This paper legally recommends that the KRG must try to negotiate with the Iraqi federal government following a bilateral agreement under the supervision of international mediation whereby the Kurdistan region can have the right to secede when a constitutional violation is taken place by the federal government. Kurdistan region must review its relations with all international actors, which play a main role in the Middle East and make a lobby group by including separatists groups and other Kurds who live abroad to gather support for its independence in the future.

Keywords: Self-Determination, Kurdish Autonomy, Iraqi Kurdistan Region, Kosovo and Serbia, International Community.

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1. Introduction

The right to self-determination to achieve an independent state is not a deprived and illegal issue, but it can always be debated based on the interests of the other countries in the world. The value of self-determination is closely connected to one of the various basic philosophies of public international law which establishes the right of the populace to design the way to live without any form of molestation and external influence. Such a principle thus espouses the equality of people and abhors injustice and discrimination. The tenet of self-determination is an integral aspect of public international law and international human rights law. Historically, most internal and external wars which had occurred in different nations were due to the lack of a sovereign state or self-government, such as in both First and Second World Wars. In other words, the victimized entities had been sacrificed by the host states and suffered because their rights' were being violated by the host states. Therefore, they tried to find another solution to live their own life freely, either by struggling for independence peacefully or through non-peaceful ways. Moreover, some regions had failed to establish their own independent state, while some others had been successful due to different circumstances and situations. For instance, the protracted conflict in the Kurdistan region makes it seemingly impossible to gain independence, hampered by the fact that they have been receiving limited international recognition, as it does not seem like a political concern across the globe. The call for separation started decades ago and the future of such aspiration looks bleak and hopeless. Besides, many regions and provinces of the same political encumbrances had been successful in gaining

either total independence or limited political sovereignty from the federation or host state in which they have previously existed. Recognition of some states is still being withheld, or at least not fully or officially acknowledged, like South Sudan, Timor Leste, and Kosovo. The questions that arise here are: why has it been difficult for such a political movement to be extended to the Kurds in Iraq? How would one explain the difference between the success of Kosovo's emancipation and the failure of the Kurdistan region to replicate the same feat? Or as a research question, what are the reasons for the failure of the Kurdistan region's independence and the success of Kosovo independence? In providing answers to these questions, defining self-determination, precise analysis of Kosovo, and Kurdistan cases will be explored.

2. Defining Self-Determination

The right of self-determination is a crucial aspect of international law which has been a subject of debate for decades. This kind of international response to the rights of people across the globe has allowed many nations, states, tribal groups, and ethnic nationalities to attain statehood and by extension sovereignty. It has been an avenue through which independence and autonomy have been achieved by many races that had hitherto under the tutelage of a more powerful ruler. The right as stipulated by international law gives room for individuals, and groups of people collective freedom, to pursue social, political, and economic activities without any intimidation, oppression, and persecution. (ICCPR & ICESCR, 1966).

Articles 1 (2) and 55 of the UN1 Charter clearly stress the entitlement of self-determination which forms the background for the chapters relating to the non-self-governing regions and the

trusteeship system. Article 1 (2) states one main rationale behind the formation of the United Nations which is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Furthermore, the Universal Declaration of Human Rights (UDHR)², besides, followed the same pattern as the UN Charter with more elaboration. Article (1) of the ICCPR³ states that "All peoples have the right to self-determination, and may freely determine their political status." Accordingly, a nation, which is a signatory of an international treaty, is obliged under international law to refrain from acts which would defeat the purpose and object of the treaty, (Vienna Convention on the Law of Treaties, Article 184, and codifying earlier customary international law).

The manner, with which the language of the common Article 1 of the International Covenant on Civil and Political Rights (ICCPR), strongly indicates the will to regulate political reliance or autonomy. And as a matter of fact, General Assembly Resolution 1514⁵ asserts that self-determination is extended to the right to complete independence from foreign domination, at least in relevance to territory or political entity under the colonial yoke. Besides, the tenet of self-determination as defined by international law is not restricted to just juxtaposition between reliance and autonomy. General Assembly Resolution 2625⁶ of 1970 elaborates many several methods and means through which a political collective can pursue self-determination. It reads as thus, 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 constitutes modes of implementing the right of self-determination by that people.

In 1966, the ICCPR came into force which complemented the UN Charter. Since 1966, there has been growing concern on the roles of the global community that the literal application of the principle of self-determination in Article 1 could lead to the constant agitation for secession and irredentism among existing States which may not be palatable for global peace and security. In the ensuing intellectual debate, to determine the practice of the principle of self-determination, it can be argued that the agreement, which has surfaced, is that the entitlement to self-determination concerning ICCPR Article 1, applies only to these ensuing political and social conditions; (1) complete populace residing in autonomous states, (2) complete populace of regions yet to attain autonomy, and (3) regions under foreign martial rule. (Harris, 2008).

Additionally, self-determination in international law is the lawful entitlement for the populace to achieve a particular extent of independence and self-governance from its host nation. (Sterio, 2009). Former U.S. President, Woodrow Wilson, who was at the helm of affairs throughout the First World War (WWI), defined the notion of self-determination during a meeting in the League of Nations (LN) in 1919 as,

the right of every people to choose the sovereign under which they live, to be free of alien masters, and not to be handed about from sovereign to sovereign as if they were property. The right which arises when there is international recognition of the rights of the inhabitants of a colony to choose freely their independence or association with another State. (Berrigan, 2003, p.300 & Cass, 1992).

In a related development, self-determination has been defined by various scholars and has become an important slogan that determines the direction of the global order as it applies to individuals and a group of people. (Lowe & Fitzmaurice, 1996). In this case, self-determination is away and a process through which the right of a group or individual can be asserted in a particular political setting. This can be achieved by one of the following ways, i.e. integration, association, or independence. (Cass, 1992).

Regarding the holders of the right to self-determination, "People" and minorities are two unique notions. Minorities do not fall into the class of "whole population", from Article 1 of the ICCPR as referenced above, and in this way, are not qualified for the privilege of self-determination. Fundamentally, under the rule of self-determination, a group with a typical character and connection to a characterized territory is permitted to choose its political future by way of a vote. For a group to be qualified to exercise its right to autonomy, it must first be qualified as a people. (Scharf, 2002).

To decide when a group is qualified as a people, a two-section test should be applied; ultimately, peoplehood must be viewed as dependent upon both objective and subjective components. The principal component is objective and works to assess the group to decide to what degree its members share a typical racial foundation, ethnicity, language, religion, history, and traditional legacy. It very well may be recommended that the connection should be expressed, among other ways, in a common region, religion, or language, yet these prerequisites are quite difficult to meet. (Scharf, 2002 & Dinstein, 1976).

The next component is subjective and looks at the degree to which people inside the group subjectively see themselves as "people" and the degree to which they see themselves as a collective, particularly, whether they can constitute a feasible political body. As such, it is insufficient to have an ethnic connection of mere past lineage and history; it is also necessary to have a present ethos or perspective. An individual cannot just usurp his place and force people to embrace and accept him; the group needs to decide whether such an individual is qualified. It can therefore be summarized that for a group to be considered as a "people," they should first see themselves as possessing a unique connection to the land and therefore the state, thus expecting everyone else of different ethnicities to also have the same relationship and allegiance. (Dinstein, 1976).

Moreover, the issue of self-determination in the UN Charter is connected to decolonization which would eventually allow the dependent colonies to secure independence. It needs to be reiterated here that Article 737, only stresses on self-governance, but the boundary of the meaning was extended to internal self-government and independence from foreign domination. The International Court of Justice (ICJ) through the UN employed the concept of self-determination to assess and evaluate the cases of Namibia⁸ and Western Sahara⁹. In the 1960s and afterward, many experts of international law had realized that the concept cannot only be applied to governments but also people, and the concept has since become a subject of much debate with different interpretations and applications.

The advent of the concept of self-determination, as a crucial development and decolonization slogan, passed through the popular UN General Assembly resolutions 1514 in 1960, which ultimately

received recognition among other nations. The tenet of self-determination is a widespread notion, and for hypothetical reasons, it consists of internal and external types. The entitlement can be fulfilled either externally, for instance, by the formation of a new nation, or internally via various self-governing provisions. An essential trait of the entitlement to self-determination in the colonial setting is its external manifestation; denoting the aim to acquire an autonomous sovereign state. The external type of self-determination demands efforts from, and enforces requirements on states to assist, and sustain the population's aims in attaining autonomy. (Cassese, 1995)

Conversely, self-determination, outside the colonial setting, possesses an internal character that comprises the population's entitlement to willingly establish its own institutions for economy, society, and culture, preferably by way of democratic authority. Internal self-determination, as the entitlement to genuine self-governance, is actually the people's right to voluntarily choose its own governmental and financial authority. Internal self-determination may develop, in a variety of styles, inclusive of autonomy within a state, federal provisions, or any other distinct constitutional provisions for the population. Alternatively, external self-determination is deemed as the entitlement to deliberate and adopt the political standing of the populace and its ranking in the international community concerning other nations, inclusive of the entitlement to break away from the current host nation, and to establish a new autonomous state (Cassese, 1995).

3. History of Kurdistan's Struggle for Independence

Historically in Iraq, Kurdish domestic factions have struggled to defend their ethnic character, vernacular, self-sufficiency, and

liberation. In 1961, Abdul Karim Qasim from the Iraqi government rejected the appeal by Mulla Mustafa Barzani for Kurdish autonomy. The Kurdish revolution started on 11 September, when Mustafa Barzani publicized a decree to all Kurds to bear arms against the Iraqi military and the government. From 1971 to 1980, more than 200,000 Faili (Shia) Kurds were banished from their homeland by the Iraqi government. ("Contemporary History," 2019).

In 1974, although at first Saddam Hussein assured the Kurds more rights and self-sufficiency, he breached their trust by initiating organized prejudice and subjugation. (O'Leary, 2002). In 1983, regardless of age, 8,000 males of the Barzani clan went missing, speculated to have been organized by the Iraqi government. From 1987 to 1989, the Anfal campaign was executed by the Iraqi government against Kurdistan's civilians which had involved genocide, mass summary executions, disappearances, extensive demonstration of chemical armaments, and the devastation of small communities, rural trade, and infrastructure. The campaign claimed approximately 180,000 lives. Chemical bombs were dropped on the town of Halabja on 16 March 1988. In the incident, 4,000 to 5,000 lives were estimated to have been lost, especially among civilians. ("About the Kurdistan Regional Government," 2018).

The United States commanded an alliance of Great Powers in the Gulf War from August 1990 until February 1991 to terminate Iraq's invasion of Kuwait, which threatened the stability and security of the Middle East. ("Iraq: Politics and Governance," 2016). The Iraqi government retorted to the opposition from Kurdish Peshmerga forces with the genocide of the Kurdish civilians clustered near the regional border. A defensive sector was

then established for Kurds in Northern Iraq by the Gulf War alliance, and compelled by the humanitarian predicaments that had transpired. (Fuller, 1993).

The support for Kurdish separation efforts by the international community eliminated Saddam Hussein's regime's domination over Northern Iraq (Kurdistan Region), which ceased the persecution of Kurds and led to the initiation of democracy by the KRG. The Kurdish "haven" allowed the KRG to form self-sufficient establishments and collaborate with the United Nations and international communities to reconstruct the Kurdish society, infrastructure, commerce, and petroleum trade. (Tea, Sasha & Nahro 2017).

The revolt of Kurds and Shia in Iraq against the central government in April 1991, led to the UN resolution 688 (UN Security Council, resolution 688, 1991), which divided Iraq in two. Based on the resolution 688, a coalition of eleven states, led by the United States and Turkey, provided a haven i.e. a defensive sector, for the purpose to allow humanitarian aid and safety for exiles near the Iraqi-Turkey borders. (O'Leary, 2002).

The newly-formed circumstances, founded the Kurdistan National Assembly, intended to defend the Kurdistan Region from the aggression of Iraq's previous Baath' regime. ("About the Kurdistan Regional Government," 2018). The transnational intercession against the Iraqi totalitarian regime, in 1992, allowed the Kurdistan Regional Government to attain self-determining autonomy. (Jude, 2017). After the first free and democratic elections in 1992, the KRG imposed managerial self-governing rights and enhanced the people's lifestyle by administering significant petroleum resources and instituting quality amenities for

the residents of Iraqi Kurdistan with assistance from international foundations. (Jude, 2017). Ultimately, the Federal Government of Iraq endorsed a constitution that acknowledges Kurdistan's self-sufficiency and its regionalized federal structure in 2005. (McGarry & O'Leary, 2007).

In the outcome, Kurds have served a crucial function in the Federal Government of Iraq, enthusiastically participating in the political system, contending in the federal presidency for some years, yet concomitantly safeguarding the constitutional rights for KRG's autonomy. (Beehner, 2006). The United States' military forces began pulling out of Iraq in 2007, but its objective was to bequeath steadfast governance and an unbroken state on ethnic and religious foundations. ("Obama: the U.S. to withdraw most Iraq troops," 2009).

In favor of the Iraqi regional reliability, Joseph B. Biden, Vice President of the United States, and Les Gelb, president emeritus of the United States Council on Foreign Relations, ratified a suggestion for a federal union of three identities as in Bosnia's circumstance. Nevertheless, the proposal was unproductive due to the incapacity of creating a feasible Iraqi government. (Williams & Simpson, 2008). The United States' policy of defending the regional orderliness of Iraq, based on domestic security, prompted the consent from Kurdish political parties to partake in the Federal Government of Iraq.

In one more occurrence, on September 25, 2017, Iraqi Kurds organized an independence referendum because the Federal Government of Iraq violating their constitutional rights. (Bagheri, 2017). It was a regular tranquil day in the Kurdistan region of Iraq as the Kurds were appreciating freedom and prosperity in the

streets, fixating on everyday routines, and fostering friendly social interactions with each other. (McKernan, 2017). The Kurds had not forgotten their past misery brought about by the Iraqi government, yet for a while, relished the existence of a free day, filled with optimism. For some time, Kurdish political leaders maintained the existing state of affairs concerning Kurdistan's independence from Iraq. On the contrary, the international community, particularly, the United States refuses to acknowledge the referendum, for it only reinforced the Kurdistan region to be included in the agenda for the unification of Iraq. (Dalay, 2017).

4. History of Kosovo's Struggle for Independence

The origin of the ethnic clash between Serbia and Kosovo can be traced to the implementation of the Yugoslav Constitution 1974 when Serbs started organized persecution, human rights mistreatments, and aggression against the Albanian majority residents. (Kaufman, 1999). From 1974 to the fall of Yugoslavia, Kosovo had been a self-governing territory, with similar voting rights like the other six republics: Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, and Macedonia. (Roberts and Garton Ash, 2011). The peak of the unfair Serbian policy was accomplished throughout the 1990s when Albanians were deprived of the entitlement to vernacular, education, media, service, jobs, and acceptance in civil institutions. (Klemenčić, 1998).

In 1989, organized persecution was applied onto the Albanian majority residents by Serbia when they rescinded Kosovo's self-rule after disagreeing with Kosovo's autonomous status. (Woehrel, 1999). Throughout 1990, following the rise of Slobodan Milosevic to power, and the agenda of Serbian ultra-nationalists to modify the administrative system in Kosovo, led to the ethnic clash. (Negash,

2013). Serbian nationalism was inspired by the folklore of renewing Great Serbia, protecting Serbian nationals and their religion in all regions of Yugoslavia, by any means necessary, inclusive of subjugation and annihilation of other ethnic groups. (Macdonald, 2001).

Kosovo's separation was planned on the philosophy of defending national identity by pursuing self-governance within the territory and to attain liberation, democracy, and sovereignty. (Pechalova, 2017). The Albanian self-governance campaign was intolerant of Serbia's oppression and withdrawal of previous entitlements to the Albanians. A huge number of refugees were produced by the ethnic conflict in Yugoslavia (Kaufman, 1992). In the Serbian repressive regime, 863,000 civilians pursued or were driven into asylum outside Kosovo, whereas an extra 590,000 were internally exiled. Furthermore, there was proof of extensive rape and torture, as well as raiding, plundering, and blackmail. ("Independent International Commission on Kosovo," 2000).

Serbia was involved in armed conflicts with Slovenia, Croatia, Bosnia, and Kosovo from 1991 to 1999, based on safeguarding Serbian citizens and stopping the collapse of Yugoslavia. Consequent to the Serbian nationalistic movement against other ethnic groups in Yugoslavia, the international community intervened to put a halt to Milosevic's dictatorial rule. (Kaufman, 1999).

The defining moment in the external encounter to resolve Kosovo's separation is transpired because of Serbia's escalated aggression of human and civil rights, and the Albanian petition for liberation. (Borgen, 2008). The Albanian nonviolent movement formed equivalent organizations that functioned until 1997 for

education and health care; the two aspects from which Albanians had been comprehensively left out under new Serbian laws. (Gardner, 2008). The intensification of the Kosovo war started in February 1998, in Prekaz, where the Serbian annihilated 58 Albanians. ("The Kosovo crisis after May 1997," 2000).

After unsuccessful diplomatic attempts in Rambouillet, France, to reach a pact between parties, namely the Kosovo Liberation Army (KLA) and Serbia, who had been engaging in armed conflict from February 1998 to March 1999, NATO launched airstrikes against the Federative Republic of Yugoslavia (FRY) (Bekaj, 2010). The international community, including the United States, major European countries, and the United Nations, reinforced Kosovo's rebuilding and organized dialogs over Kosovo's administrative standing. (Weller, 2008).

In March 1999, the North Atlantic Treaty Organization (NATO) bombed the FRY to terminate the premeditated plan of subjugation, genocide, and aggression pursued by the Belgrade regime under the leadership of President Milosevic ("Statement on Kosovo," 2009). A peace treaty was reached in June 1999, where the (UN) Resolution 1244 sanctioned the placement of NATO's Peacekeeping Forces, Kosovo Force, and established the United Nations Interim Administration Mission in Kosovo (UNMIK). ("Independent International Commission on Kosovo," 2000).

In the intervening time, Kosovo's Provisional Government was formed. After arduous dialogs with Serbia, Kosovo was declared an independent and free nation by the Assembly of the Republic of Kosovo on February 17, 2008. The United States and major European nations made official statements that acknowledged the move which also gained worldwide recognition (Almqvist, 2009).

5. Analysis

As explained earlier, on February 17, 2008, the Kosovo region, after decades of the bloodbath, declared itself an independent entity ("The History behind a Declaration of Independence: Kosovo," 2015). Immediately after the declaration, the people of Kosovo went to the street to celebrate the much-awaited independence with friends and relatives. The declaration of independence was received by multilateral organizations like the United Nations, the European Union, and the North Atlantic Treaty Organisation (NATO). Some European countries, the U.S., and other states within the international system followed suit in recognizing the independence of Kosovo (Hamilton, 2008). Within a week, 113 states had signified their intention to recognize the newly-created state of Kosovo. Only five EU members still held their recognition. In effect, the widespread recognition that the declaration had received, accorded Kosovo with the status of statehood within the global system. Kosovo's independence finalized the disintegration of Yugoslavia (Cottey, 2009).

The primary right to secede is rejected as it can be viewed as requesting the right to violate the territorial integrity of a State. Nevertheless, when there were institutional abuses of fundamental human rights, the ethnic groups might legally declare independence. Secession has to be the sole option to right the prejudice that has occurred. For instance, in the case Kosovo, it was granted independence based on maltreatment of human beings and infringement of domestic self-governance; however, it was not associated with decolonization, dictating regimes, or disintegration of the State (Buchanan, 2004, p.338, Seymour, 2007, p.395 & Buchheit, 1978, 73).

Likewise, the International Court of Justice (ICJ, 2010) dispensed its Advisory Opinion in reply to the United Nations General Assembly's (UNGA) appeal on the legitimacy of Kosovo's autonomous pronouncement. The global public anticipated the ICJ to resolve on the lawful outcomes of the declaration whether or not Kosovo has attained statehood, or concerning the legitimacy and lawful consequences of the acknowledgment of Kosovo (Grotić,1991). Consequently, The ICJ10 found that Kosovo's unilateral declaration of independence did not breach international law. The court stated that the criteria that could reasonably preclude the declaration of independence remain valid under public international law, resolution of the Security Council, and constitutional structure for Kosovo. Moreover, the court claimed that "the illegitimacy added to the independence announcements was therefore not related to the arbitrary existence of those declarations as such, but the reality that they were or would have been linked to the illegal use of force or other infringements of the rules of fundamental international law, in particular those of a peremptory character."

In a similar version, on September 25, 2017, Iraqi Kurds ambitiously progressed towards independence by conducting a regional referendum among the Kurds, both in the Kurdistan Region and the disputed territories, before declaring its independence from the Iraq federation. ("Iraqi Kurds decisively back independence in the referendum," 2017). Like what Kosovo had gone through, the Kurdistan region was also waiting to receive recognition from the international community, but none was forthcoming. Briefly, after the declaration of independence, the Kurds were preoccupied with joy, hoping to end the decades of enslavement and repression from the federation of Iraq.

(McKernan, 2017). The main issue behind the declaration of independence was to ensure that the region holds the monopoly of political power, economic prosperity, and prospects for oil. (Soderberg & Phillips, 2015).

A one-sided referendum might be (i) a referendum without a clear legal basis in international law which can be an international agreement or an action of an international body, (ii) a referendum which is conducted opposing to the international community's specific criteria. The international community rejected the independence referendum conducted on 25 September 2017 in the Iraqi Kurdistan region. Therefore, a referendum to this kind of end would definitely be found to be illegal by international law (Şen,2017). However, the referendum is a method of applying the right of self-determination under GA resolution 63711 of 195 resolutions 637 issued on 16 December 1952. It is recognized as a democratic way whereby people can exercise their wish to choose a political system.

On the other hand, the Iraqi Kurdistan region is not under the colony to exercise the right to self-determination according to international law. However, Kosovo was not a colony but it achieved its own independence. Moreover, referring to the Iraqi Constitution, as a legal base for the Kurdistan referendum, is problematic for two reasons. First, the Constitution does not give the power to start unilateral referendums to the regional governments. Second, the Constitution does not explicitly articulate the words "secession" or "independence" in any provision. Even if one may be tempted to think whatever is not prohibited by the constitution is permitted, this does not include eliminating the Constitution in Kurdistan employing secession. Besides, the "free will of the citizens" adheres to its boundary fixed by the

Constitution under Articles 1, 13, 140¹², and it precludes unilateral secession. Thus, the referendum on independence conducted in Iraq's Kurdistan region is legitimately baseless; in both view of Iraq's constitution and international law (Şen,2017).

However, all ethnic groups could legitimately secede if there were systematic violations of basic human rights, as with the Kosovars in Kosovo, and serious and persisting violations of intrastate power-sharing or autonomy agreements by the State, as the brutal secessionist conflicts that have occurred in Eritrea. This right to secede, however, can only be considered a remedial right to self-determination.(Buchanan, 2004 ,p.338 & Seymour,2007 ,p.395).Therefore, the KRG justified its referendum as an act under international law, and as constitutionally based on the preamble of the Iraqi Constitution which states that "The adherence to this Constitution preserves for Iraq its free union of people, of land, and sovereignty."(Iraqi Constitution, 2005).

Although, Kosovo and Iraqi Kurdistan possess comparable separatist activities, (Agushi, 2016, p.3-4) however, the KRG differs from Kosovo in terms of international legal decisions. For example, several states submitted briefs to the International Court of Justice in its Advisory Opinion on Kosovo to contend for Kosovar's withdrawal and autonomy, in light of the contention that international law grasped a standard of remedial withdrawal/outside self-assurance in examples of serious abuse by the mother state. This sort of independence is hard to make for Iraqi Kurds. The present Iraqi leadership has seemed ready to allow Kurdistan some type of self-rule (Sterio, 2018). However, the Kurdistan region has its own international law standards for becoming a statehood as stated in Article 1 of the Montevideo Convention¹³ on the Rights and Duties of States such as a

permanent population, a defined territory, government, and, capacity to enter into relations with other States.

Furthermore, the Kurds have clearly demonstrated that they possess an individual identity, and make up most of the population in a specific area. The Kurds therefore adequately qualify as "people" with the end goal of self-governance. Then again, the issue of self-determination for the Iraqi Kurds as a segment of Iraq's constitutional and political structure goes back to March 1970, when Iraqi Kurds and the Iraqi government marked a proclamation that called for Kurdish self-governance, and where a census was meant to be conducted in 1974 to decide the boundaries of Kurdistan region (Tripp,2002, p.117). However, the agreement for self-determination totally missed the mark concerning Kurdish requests. Kirkuk was not surrendered, and more importantly, it forced an unfathomably more focal government command over the area than the agreement initially visualized (Yildiz,2007, p.20-24). In 2005, as a type of shared principle and self-governance, the Iraqi Constitution built up a federal focal government and provincial governments. The new Iraqi Constitution forms a federation that consolidates components of self-governance, where they can experience a specific level of self-governance about the government, despite sharing control of the administration. Notwithstanding, the KRG criticized the subsequent Iraqi governments for plainly abusing the social, traditional, and financial privileges of the Kurds (McGarry & O'Leary, 2007).

It has been recognized that the community, which entitlements the right to self-determination, must satisfy assured specific criteria; they must be viewed as the citizens, the country, by themselves and by the world; this is accomplished by the shared history, culture, and language. Kosovars are people who have lived

for centuries in Kosovo. The Kosovar Albanians though are viewed quite widely as an ethnic Albanian than as a nation within themselves (Borgen, 2008).

However, this concept of people as a nation was criticized because it was too limiting. In Opinion, No 2 (1992), the European Conference on Yugoslavia's Tribunal Committee on the Serb inhabitants of Bosnia and Herzegovina Higgins state that, People should be known in the context of the entire population of a given region. Of course, all representatives of different minority groups are part of the territorial people. In this context, they are also owners of the right to self-determination as persons. Minority groups as such, though, have no right to self-determination. Besides, this implies that they have no right to independence, secession, or join analogous communities in other countries. Thus, although Kosovo Albanians can qualify as a people for self-determination purposes, the validity of such a right does not in itself mean that secession can be supported (Harris,1998, p.120 - 121 & Vidmar,2009).

Similar to Kosovars, the Iraqi Kurds have met both sets of criteria. First, they share a belief of unity and separateness from the rest of the peoples in Iraq. They expressed such feelings of ethnic difference throughout various political and military protesters since the establishment of the Iraqi State in 1920. In January 2005, Kurdish non-governmental organizations, "NGO" collected 1,700,000, give a signature on petitions demanding a vote on whether Kurdistan should remain part of Iraq. The people of Kurdistan almost unanimously preferred independence to be part of Iraq. Likewise, they held an independence referendum on 25 September 2017(Galbraith, 2006, 243 & Eppel, 2018).

The Kurdish language has additionally been created in the domestic arena. In particular, there has been across the board improvement and show of national images, for example, the Kurdish flag, hymns, and the erection of statues and representations of Kurdish national pioneers, and another Kurdish schedule. These images are noteworthy because they are unmistakable signs of a Kurdish feeling of shared personality, given that the Kurds see themselves as the whole as Kurds and have been battling for self-rule and freedom. In this manner, the Kurds in Iraq are considered as a "people" since they fulfill the subjective component of autonomy (Bengio,2006, p.176).

Second, Iraqi Kurds have the same language, traditions, faith, and lifestyle, therefore partially are qualified as "people" with the end goal of autonomy. The Kurds speak Kurdish as their customary language, in four different vernaculars. All vernaculars are nonetheless normally alluded to as just "Kurdish", which has become a typical language all through the territory. Kurdish is taught at the secondary and tertiary levels. The communication and print media are in Kurdish as well. The Kurds are not strictly homogeneous in terms of faith; however, most Kurds commonly practice and profess Sunni Islam, amounting to approximately 75% of the populace. (Dawoody, 2006).

Apart from the legal side, the long waiting for acquaintances within the international system to declare their support for Kurdistan's independence was disappointing. (Khorshid, 2014). It has been critically noted that the international community does not respect the international law perspectives regarding peoples' right of self-determination but it follows its own interests, therefore, it does not have an interest in the independence status of the Kurdistan region with most preferring to support the maintenance

of the territorial integrity of Iraq. Within such an international political atmosphere, where most states seem to share the sympathy for the national entity of Iraq, it would be very difficult for Kurdistan to receive any form of recognition from any state.

It should be noted that both Kosovo and Iraqi Kurdistan passed through identical stages of experiencing repression and humanitarian crisis for decades. (Garton Ash, 2003). Considering the civil condition within the Kurdistan region and Kosovo, both strived to establish their own military arms to protect the civilian population against the host state's army. While Kosovo maintained the Kosovo Liberation Army, the Kurdistan region maintained its Peshmerga forces. (Hassan, 2015). Whatever argument might be advanced in favor of Kosovo's independence, Kosovo's domestic strategy has been certainly different from that of the Kurdistan region. (Saeed, 2017).

In the Kosovo case, the secessionist group relied heavily on the need to advertise their normative credentials to the international system to attract sympathy from international actors. (Casperse, 2015). The Kurdistan region could be regarded as a bastion of democracy in the Middle East as well, alongside the state of Israel. Yet, one needs to recognize that the international political atmosphere, within which the Kurds reside in the Middle East, does not allow a swift offer towards independence. The situation of the Kurdish case is highly volatile, as the Kurds can be found in various states throughout the Middle East. (Coppieters et al., 2008).

One needs to observe that the Middle East is more strategic to international actors than the southern European region of Kosovo, and because of the presence of oil, and the tenacious state of Israel, global powers are always careful in handling the case of Kurdish

aspiration and emancipation process in the region. The political reality is that, if political independence is declared in the Kurdistan region of Iraq, other Kurds in Syria, Turkey, and Iran may stage a protest to declare the same independence. Global powers would find that the regional ramifications may be very tense to handle. In effect, the issue of the Kurds' political emancipation is a matter of political calculation and geopolitics in the Middle East. This unique political reality is in contrast with what was obtained in the region where Kosovo resides. However, the 2017 KRG referendum was not in favor of international order or even a regional system. If the KRG independence was being achieved, it would have directly affected the regional balance of power and the regional state system in which both of the US and other Iraqi neighbors were directly influenced, while in Kosovo the case was not against international order even a regional state system.

6. Conclusion

In the sequence of this paper, it can be seen that the value of self-determination is closely connected to one of the various basic philosophies of public international law which establishes the right of the populace to design the way to live without any form of molestation and external influence. It is the self-determination principle that gave impetus to the decolonization process and also allowed ethnic nationalities to assert their control from a self-governing state. Although, the right to self-determination is found in many international documents, but can never be expressly defined. Therefore, the lack of a clear and universally accepted definition concerning "people" is one of the primary reasons the international community is unable to respond coherently to the increasing number of claims to self-determination and demands for secession.

Furthermore, this paper showed that Kosovo and the Kurdistan region fought for their own independence in several different stages. Iraqi Kurds have been struggling for their own fateful rights from multiple Iraqi governments from 1961 until now, but so far they have not obtained the objective, succumbing to the promises made by successive Iraqi governments. Likewise, people in the Kurdistan region have become victims of mass killing, extermination, homelessness, with many who have disappeared and/or have been displaced from their own homeland. On the other hand, this paper illustrated that the international community has protected the Iraqi Kurds from military threats by the Iraqi government and has supported the Kurdistan Region in the framework for the unity of Iraq. This led to the Kurdistan region's attempt to obtain an autonomous government until later; it was stated in the Iraqi constitution as a federal region. Accordingly, the Kurdistan region developed its economic sector and relations with other countries to gather support for its own independence, but the Iraqi government stood against the constitutional rights of the Kurdistan region's people, as well as against the development of the Kurdistan region. Therefore, the independence referendum of the Kurdistan region, organized on 25 September 2017, failed to attract the international community's recognition. The reason was that the international community had a political and economic interest in the unity of Iraq, while Iraq's neighbors such as Syria, Turkey, and Iran will never accept a Kurdish state in Iraq due to the existence of many Kurds in their own countries. Thus, the independence referendum was unsuccessful due to the abovementioned reasons. However, having an international community's support can be a legal basis of Kurdistan's right to self-determination as the Kosovo case which is confirmed by the International Court of Justice.

Similarly, Kosovars fought for their own independent due to the violations and abuses by the Serbian government against them, such as discrimination and ethnic cleansing. Likewise, the international community (UN, NATO, and U.S.A) intervened in the situation and protected the people of Kosovo in Serbia. In the aftermath, Kosovo declared its own independence and it was recognized by the international community. The main different point between both cases of the Kurdistan region and Kosovo regarding their independence is that Kosovo's independence received international recognition which is supported by the International Court of Justice, while the independence referendum of the Kurdistan region did not. The international community had its own political and economic interests in the establishment of an independent state of Kosovo. Hence, it can be said the economic and political factors can become a legal justification in the case of the establishment of new states. Otherwise, the Kurdistan region has all criteria of statehood under international law.

Finally, it can be recommended that the KRG must try to negotiate with the Iraqi federal government based on a bilateral agreement under the supervision of an international party whereby the Kurdistan region can have the right to secede when a constitutional violation will be taken place by the federal government, because the reason which leads to Kurdistan region's independence referendum was the violation of the constitutional rights by the federal government, and the agreement should be passed by the Iraqi federal parliament. Also, the Kurdistan region should review its relations with all international actors, especially the ones with strong economic and political interests in the Kurdistan region, as well as those with effective decision-making policies in the Middle East such as the U.S.A, the U.K., France,

Germany, Russia, and Turkey. To advance its relations for gathering support for its independence, in the future, the Kurdistan region should also convince the EU and the UN, in general. Despite this, Iraq's Kurdistan region should try to form a lobby group comprising of separatist groups and other Kurds who live abroad, influence, convince, and coerce the world's international community to support an independent Kurdish state in Iraq. Eventually, the current situation in the Middle East, due to political equations between international and regional partners, especially in Iraq and Syria, can predicate a Kurdish state in Iraq.

Notes:

"Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo." ICJ Advisory Opinion of 22 July 2010 [2010] ICJ Rep [hereinafter the Kosovo Opinion] para 78 and 122. Available at: <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>. [Visited date March 3, 2020].

Iraqi Constitution, 2005. Article 1 states that "The Republic of Iraq is a single federal, independent and fully sovereign state in which the system of government is republican, representative, parliamentary, and democratic, and this Constitution is a guarantor of the unity of Iraq." Article 13 states "First, this Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception. Second, no law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void." Article 140 states "First, The executive authority shall undertake the necessary steps to complete the implementation of the requirements of all subparagraphs of Article 58 of the Transitional Administrative Law. Second, The responsibility placed upon the executive branch of the Iraqi Transitional Government stipulated in Article 58 of the Transitional Administrative Law shall extend and continue to

the executive authority elected following this Constitution, provided that it accomplishes completely (normalization and census and concludes with a referendum in Kirkuk and other disputed territories to determine the will of their citizens), by a date not to exceed the 31st of December 2007."

Montevideo Convention on the Rights and Duties of States, Art.1, 1933, Available at <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>. [Visited date March 1, 2020].

Namibia Opinion, ICJ Rep16 (1971). The Court had affirmed that "the subsequent development of international law regarding non-self-governing territories as enshrined in the Charter of the UN, made the principles of self-determination applicable to all of them." Available at: <https://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf>. [Visited date March 3,202].

The International Covenant on Civil and Political Rights, United Nations Treaty Series. December 16, 1966, and International Covenant on Economic, Social and Cultural Rights, United Nations Treaty Series, December 16, 1966. Common Article 1 states, "All peoples have the right of self-determination. By that right, they freely determine their political status and freely pursue their economic, social, and cultural development." Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. [Visited date March 2, 2020].

UN Charter, 1945, Art.73. Available at: <https://www.un.org/en/sections/un-charter/un-charter-full-text/>. [Visited date March 3, 2020].

UN Charter, 1945. Articles 1(2) & 55. Available at: <https://www.un.org/en/sections/un-charter/un-charter-full-text/>. [Visited date March 2, 2020].

UN General Assembly, Fifteenth Session, Official Records, Supplement 2, Declaration on The Granting of Independence to Colonial Counties and Peoples, Resolution 1514 (XV), A/4494, 1960.available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx>. [Visited date March 3, 2020].

UN General Assembly, Seventh Session, The right of peoples and nations to self-determination, Resolution A/RES/637(VII), 1952. It states "Whereas the right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights." Available at: <https://www.refworld.org/docid/3b00f0791c.html>. [Visited date March 1, 2020].

UN General Assembly, Twenty-fifth Session, Official Records, Supplement 2, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States following the Charter of the United Nations, Prepared by Sixth Committee in Pursuance of UN General Assembly Resolution 2625 (XV), A/8082, 1970. Available at: https://treaties.un.org/doc/source/docs/A_RES_2625-Eng.pdf. [Visited date March 2, 2020].

United Nations, Universal Declaration of Human Rights. Available at: <https://www.un.org/en/universal-declaration-human-rights/>. [Visited date March 2, 2020].

United Nations, Vienna Declaration and Program of Action, the World Conference on Human Rights, 1993 A/CONF.157/23. <http://www.un-documents.net/ac157-23.htm> [Visited date March 2, 2020]. And (Vienna Convention on the Law of Treaties, 1969, Vienna, Article 18 that provides "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty."

Western Sahara Case, ICJ Rep 12 (1975). The Court again affirmed the linkage between self-determination and the right of peoples under colonial rule, when it spoke of the "principle of self-determination as a right of peoples, and its application to bring all colonial situations to a speedy end." Available at: <https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf>. [Visited date March 3, 2022].

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پوخته:

هەريمی کوردستانی عێراق و کۆسۆڤۆ خەباتی خۆيان هەيه بۆ پيادهکردنی مافی چاره‌ی خۆننوسینی خۆيان. هەردووکیان قوربانییەکێ ژۆریان داوه وه‌کو ئەنجامیکی هەولدان بۆ بەدەستیهێنانی دەوله‌تی سەربه‌خۆیی به‌لام سەربه‌خۆیی کۆسۆڤۆ سەرکه‌توو بوو به‌ به‌راورد به‌ هەولی هەريمی کوردستان بۆ سەربه‌خۆیی که سەرکه‌توو نه‌ بوو. ده‌بیّت وا دابنرێت که هۆکار هەبن بۆ سەرنه‌که‌وتنی سەربه‌خۆیی له‌ هەريمی کوردستانی عێراق، وه‌ هەروه‌ها بۆ سەرکه‌وتنی سەربه‌خۆسی کۆسۆڤۆ. پێوسته‌ به‌ژه‌ندیه‌کانی کۆمه‌لگای نێوده‌وله‌تی له‌ هەردوو باردا بدۆزرێنه‌وه‌. به‌ مانایه‌کیتر هۆکاره‌کانی سەرکه‌وتنی سەربه‌خۆیی کۆسۆڤۆ سەرنه‌که‌وتنی سەربه‌خۆیی هەريمی کوردستان چين. بۆ ئەم مه‌به‌سته‌ش ئەم توێژینه‌وه‌یه ئامانجیه‌تی پیناسه‌ییکێ مافی چاره‌ی خۆنوسین، وه‌ پیاچونه‌وه‌یکێ میژوویی خەباتی هەريمی کوردستانی عێراق و کۆسۆڤۆ بۆ بەدەستیهێنانی ئەم مافه‌ بکات، له‌ گه‌ل ئەمه‌شدا شیکردنه‌وه‌یکێ وورد له‌ هەردوو باردا پێشکه‌ش بکات.

رێبازی ئەم توێژینه‌وه‌یه به‌ شیوه‌یه‌کی سەرکه‌ی پشستی به‌ستوه‌ به‌ سه‌رچاوه‌ لاوه‌کیه‌کان بۆ کۆکردنه‌وه‌ی زانیاریه‌کان له‌ رێگه‌ی په‌رتوکخانه‌. راسپاردە‌ی گرنگی ئەم توێژینه‌وه‌یه وایه‌ که حکومه‌تی هەريمی کوردستان هەول بدات گفتوگۆ له‌گه‌ل حکومه‌تی فیدرالی عێراق بکات به‌پێی ریکه‌وتنیکێ دوولایه‌نه‌ به‌سه‌رپه‌رشتی لایه‌نی نێوده‌وله‌تی که له‌ کاتی هەبوونی هەر پێشلکاریه‌کی ده‌ستوری له‌لایه‌ن حکومه‌تی فیدرال، هەريم مافی جیابوونه‌وه‌ی هەبیّت. له‌لایه‌کی تره‌وه‌ش، ده‌بیّت هەريمی کوردستانی عێراق پیاچوونه‌وه‌یکێ په‌یوه‌ندیه‌کانی خۆی بکات له‌ گه‌ل هەموو ئەو ئەکته‌ره‌ نێوده‌وله‌تیانه‌دا که رۆلێکی سەرکه‌ی ده‌گێرن له‌ رۆژه‌لاتی ناوه‌راست، وه‌ گروپی فشار درووست بکات به‌ له‌ خوگرتنی گروپه‌ جوداخوازه‌کان و کورده‌کانیتر له‌ تاراوگه‌ بۆ بەدەستیهێنانی پشتگیری بۆ ده‌وله‌تی سەربه‌خۆی خۆی له‌ داها توودا .

وشه کلیلیه کان: مافی چاره ی خوئوسین ، حوکمی خو به ریوه بهری کوردی، هه ری می کوردستانی عێراق، کۆسۆڤۆ و سربیا، کۆمه لگای نیوده وله تی.

ملخص:

لدى إقليم كردستان العراق وكوسوفو نضالهم الخاصة في ممارسة حقهم في تقرير المصير. سقطت المنطقتان ضحية نتيجة لمحاولاتهن نيل الاستقلال ، لكن كوسوفو كانت أوفر حظا مقارنة بإقليم كردستان العراق في هذه الناحية، لأن محاولة إقليم كردستان لم يكتب لها النجاح. من المفترض أن يكون هناك أسباب لفشل الاستقلال في إقليم كردستان العراق ، فضلا عن استقلال كوسوفو الناجح. كما يجب النظر إلى مصالح المجتمع الدولي في كلتا الحالتين. بكلمة أخرى ، ما هي أسباب فشل استقلال إقليم كردستان ونجاح استقلال كوسوفو؟ لذلك ، تهدف هذا الدراسة إلى تعريف مصطلح تقرير المصير ، ثم القيام بمراجعة تاريخية لإقليم كردستان العراق ، و نضال كوسوفو من أجل الوصول إلى حق تقرير المصير ، وتحليل دقيق لكلتا الحالتين.

المنهجية المستخدمة في هذه الورقة هي التركيز بشكل أساسي على المصادر الثانوية وذلك من خلال المكتبة. يوصي هذا البحث قانونيا بأن حكومة إقليم كردستان يجب أن تحاول التفاوض مع الحكومة الفيدرالية العراقية وفقا لاتفاق ثنائي تحت إشراف و وساطة دولية حيث يمكن لإقليم كردستان أن ينال استقلاله عند حدوث انتهاك دستوري من قبل الحكومة الاتحادية ، بينما يجب على إقليم كردستان مراجعة علاقاته مع جميع الأطراف الدولية ، التي تلعب أدوارا رئيسياً في الشرق الأوسط ، وتشكيل جماعة ضغط تتضمن أولئك الذين يدعمون استقلال الكرد والكرد الآخرين اللذين يعيشون في الخارج من أجل جمع الدعم لاستقلالها في المستقبل.

الكلمات المفتاحية: تقرير المصير ، الحكم الذاتي الكردي ، إقليم كردستان العراق ، كوسوفو وصربيا ، المجتمع الدولي.