

The UN Security Council and Iraq's Disputed Internal Boundaries

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Abstract

The UN Security Council initially used the phrase 'disputed internal boundaries' in an operative part of Resolution 1770 (2007) and then reiterated it in preamble paragraphs of Resolutions 1883 (2009), 1936 (2010), 2001 (2011), 2061 (2012), 2110 (2013), 2169 (2014), 2233 (2015), 2299 (2016), 2367 (2017) and 2421 (2018). That was the first instance in the history the UNSC to use such phrase. This article tries to survey and analyze this unusual phrase in these resolutions and its legal repercussions in the light of Iraq's constitution as well as the political situation there. It seems that the 15-member Council has repeatedly endorsed the obligation of Baghdad and the Kurdish Regional Government to resolve their outstanding disputes including internal boundaries based on the national constitution especially Article 140. According to the Security Council, there exists a critical link between maintaining peace and security and the peaceful settlement of disputes in Iraq.

Keywords: UN Security Council, Disputed Internal Boundaries, Kirkuk, Kurdistan Regional Government.

I. Introduction

The Kurdish population is divided between Iraq, Iran, Syria, and Turkey, with smaller numbers in other countries. There are about 5 million Kurds in Iraq, not all of them living in the semi-autonomous

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Kurdistan Region of Iraq (KRI), officially governed by the Kurdistan Regional Government (KRG). The region's population (as stated by the KRG stands at 5.2 millions) that also includes non-Kurds as well as refugees and internally displaced people (IDPs).

The KRG is located in the city of Erbil, which is also known in Kurdish as Hewlêr, the largest city in northern Iraq. The KRG is recognized by Article 117 of the Iraqi constitution along with its existing authorities, as a federal region. Revenues for the Kurdish government are generated primarily from oil, although the KRG and the Iraqi government often contest the ownership of this resource.

The establishment of the Kurdistan region dates back to March 1970 when an autonomy agreement was struck between the Kurdish opposition and the Iraqi government, following years of heavy fighting. The agreement, however, failed to be implemented due to another round of bloody conflict between the Kurds and the Arab-dominated government of Iraq in 1974¹. Few years later, the Kurds and their revolt collapsed due to the withdrawal of Iranian support to them following the signing of the Algiers Agreement between Iraq and Iran. The Iran–Iraq War of 1980–88, radically changed the situation of Kurds. Saddam Hussein castigated Kurdish fighters due to their alliance with Iran.

Following the 1990-91 first Gulf War and the 1991 uprising of Kurds in the north and Shia in the south against Saddam Hussein, the United Nations Security Council adopted Resolution 688 on 5 April 1991 expressing its concern over the repression of Iraqi civilians, including in Kurdish-populated areas. The Council condemned demanded that Iraq, as a contribution to removing the threat to international peace and

¹<https://thekurdishproject.org/kurdistan-map/iraqi-kurdistan/>

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security, end the repression and respect the human rights of its population².

The Resolution served as the pretext for the military intervention that began in Iraq on 17 April 1991—even though it did not explicitly authorize the use of force. During the debate within the UNSC, prior to adoption of the Resolution, the majority of its members paid attention to the responsibilities of the Council regarding the humanitarian situation of the civilian population in Iraq, especially the Kurdish population (see Provisional verbatim record of the 2981st meeting; and Provisional verbatim record of the 2982nd meeting). Thus, States considered the violation of human rights by one of the Member States against its nationals as a threat to international peace and security, and a subject of concern for the UNSC. That is why, despite the text of the Resolution being very cautious, this did not stop states from intervening for the sake of protecting human rights³. France, the United Kingdom, and United States, therefore, used Resolution 688 to establish no-fly zones to protect humanitarian operations in Iraq, though the resolution made no explicit reference to no-fly zones. Iraqi aircraft were forbidden from flying over the zones.

In 1992, major political parties of KDP (Kurdistan Democratic Party) and PUK (Patriotic Union of Kurdistan) established the semi-autonomous Kurdistan Regional Government (KRG). The 2003 US-led invasion of Iraq and subsequent political changes led to the ratification of a new Constitution of Iraq in 2005; this codified the status

2S/RES/688, paras.1-3

3United Nations Security Council Resolution 688 (1991) on the situation in Iraq, 5 April 1991 (UN Doc S/RES/688 (1991)), OXIO 174. See: Oxford Public International Law (<http://opil.ouplaw.com>) (Oxford University Press, 2015).

of the Kurdish region within federal Iraqi states, with defined powers reserved to it.

The KRG assumed governmental responsibility in Iraq's federal region. As stipulated by the Iraqi constitution (Article 116), Iraq will be divided into federal regions that will handle their own domestic affairs while the central government will deal with international affairs. The single most controversial issue regarding federalism was oil. The KRI has been one of the most active areas for onshore oil and gas exploration in recent years⁴. The KRG has signed several oil contracts with foreign states, including companies in the United States and China⁵. According to Bloomberg L.P. if it were a country the KRG would rank 10th amongst countries with largest oil reserves. While the KRG asserts that such contracts are legal under Iraqi law and the constitution, many disputes remain.

The Arab-Kurdish dispute in Iraq is composed of several interrelated elements, including budget power sharing, contrasting views of the distribution of power, disagreement over how to conduct oil contracting and share oil revenues, and disputes over territory in northern Iraq⁶. In 2012, the Iraqi government ordered the KRG to transfer its powers over their military forces (the Peshmerga) to the federal government.

This article does not attempt, in any way, to survey all the disputes between the Iraqi government and the KRG. Rather it attempts to comment upon one particular aspect, namely the disputed internal boundaries. According to U.S. government officials, the greatest

4 Robin MILLS, *Under the Mountains: Kurdish Oil and Regional Politics*, (University of Oxford: The Oxford Institute for Energy Studies, 2016), at. 17

5 "[Sinopec bid to take part in Iraq oil deals rebuffed](#)". *Reuters.com*. Retrieved 2012-02-19.

6 Sean KANE, "Iraq's Disputed Territories: a View of the Political Horizon and Implications for U.S. Policy" (4 April 2011), United States Institute of Peace, at 3.

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potential threat to Iraq's stability is not extremist groups but the prospect of an Arab-Kurdish conflict over oil-rich Kirkuk and other disputed territories.⁷ The resolution of the political status of disputed territories, including Kirkuk, is one of Iraq's most complex and protracted territorial disputes despite numerous solutions that have been put forward. Without resolving the issue of the disputed territories, it will be increasingly difficult for Erbil and Baghdad to have a stable relationship.

The United Nations Security Council called upon the two sides to settle the disputed internal boundaries in 10 resolutions until now. In this article, we examine and analysis those resolutions and their legal impacts. This article has two sections: the first deals with the history of the dispute between the Iraqi government and the KRG. Here, the legal situation and perceived legal mechanisms to peacefully settle disputed territories will be analyzed. The second section discusses the Security Council resolutions on this matter and their legal consequences.

II. Factual and Legal Situations of Disputed Internal Boundaries under Iraqi Constitution

The disputed internal boundaries in northern Iraq between the Kurds and the Arabs have been a persistent fault - line in the state's history and have rapidly emerged as a core dispute since the 2003 U.S. invasion of Iraq. In this section, the factual and legal situation of disputed internal boundaries as well as the history and the current situation of contentious boundaries will be examined.

⁷Ibid.

A. The History and Current Situation of Disputed Internal Boundaries

The transition zone between Arab and Kurdish Iraq has been the front line of Kurdish uprisings from 1960 to 1975, a target of the Iraqi army's genocidal Anfal campaign against the Kurds in 1987 and 1988, the site of the 1991 uprising following the first Gulf War, and the northern front of the 2003 U.S.-led invasion. In between these bouts of armed conflicts, and particularly after the collapse of the Kurdish nationalist movement in 1975, the Ba'athist-led government also engaged in deliberate and systematic policies to ensure its control over what are now called the disputed territories by the expulsion of hundreds of thousands of Kurds and other minorities, destruction of hundreds of Kurdish villages, appropriation of Kurdish- and Turkmen-owned land, distribution of agricultural tenant contracts for this land to mainly Shiite Arab farmers from Iraq's south, forced "nationality correction" of non-Arab ethnic minorities to identify as Arabs, prevention of non-Arabs from holding positions in Iraq's Northern Oil Company and other state-owned enterprises, and ethnic gerrymandering of administrative boundaries in northern Iraq. Since 2003, some Arab political leaders have accused ascendant Kurdish forces of employing harsh tactics in these same areas, such as displacing Arab farmers without due process, arbitrary detention of political opponents, and even pressuring minority communities to identify as Kurds⁸.

Disputed Internal Boundaries refer to the disputed territories of Northern Iraq which are the regions defined by Article 140 of the Constitution of Iraq as being Arabized during the Baath Party's rule in Iraq. Most of these regions had previously been inhabited by non-

⁸ *Ibid.*, at 8.

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Arabs, most notably by Kurds and Assyrians, and were later Arabized by transferring and settling Arab tribes in the areas.

Currently, the Kurdistan Regional Government controls and administers four governorates (Erbil, Dahuk, Halabja and Sulaymaniyah). These governorates are situated within the boundaries of the KRI as recognized in the 2005 Constitution (the ‘Green Line’), although Kurdish authorities contend that real boundaries of Kurdish territories are not confined to the “green line”. Indeed, the green line is the one determined by western powers in 1991 by imposing no-fly zone and the establishment of defacto Kurdish government within that zone. In other words, the “green line” is a ceasefire line that the Iraqi army unilaterally established after quelling the 1991 Kurdish uprising.

The Green Line is captured in Article 53A of Iraq’s 2004 Transitional Administrative Law as “the territories that were administered by that government [the Kurdistan Regional Government, or KRG] on 19 March 2003 in the governorates of Dahuk, Erbil, Suleymaniya, Kirkuk, Diyala and Ninevah”⁹. This definition makes it clear that the KRG’s administrative writ extends beyond the four governorates, which are typically thought of as comprising the Kurdistan region proper. Unfortunately, it does not identify which areas of Kirkuk, Diyala, and Ninewa are included in this definition and no authoritative rendering of the Green Line exists¹⁰.

The Committee for implementing Article 140 defines the disputed territories as those Arabized and whose border modified between 17 July 1968 and 9 April 2003. Those areas include parts of four governorates of pre-1968 borders. We briefly consider those disputed territories in each of those governorates:

⁹ Ibid., at 9.

¹⁰ Ibid.

1. Nineveh Governorate

Nineveh Governorate Includes Aqra District and the northern part of Al-Shikhan District, which have been under Kurdish control since 1991, and the three districts of the Nineveh Plains with the population of Assyrians, Yazidis and Shabaks as well as Sinjar Tel Afar of mixed Arab and Yazidi population.

2. Erbil Governorate

The main disputed territory in this Governorate is Makhmur District which remains separated from the rest of the governorate since 1991. Makhmur is mainly populated by Arabs and Kurds, and was captured by the Iraqi army and *Hashd al-Shaabi* (the Popular Mobilization Forces or PMF) from Peshmerga in October 2017.

3. Kirkuk Governorate

Kirkuk Governorate is defined by its pre-1968 borders, including Chamchamal and Kalar districts of Sulaymaniyah governorate and Tuz District of Salah al-Din province and Kifri District of Diyala province. Kirkuk borders were altered and the Kurd-dominated districts were added to Erbil and Sulaymaniyah provinces. The Arab districts were added to Kirkuk province. Turkmen villages were added to Diyala and Salah al-Din provinces, respectively. On 13 June 2014, the city of Kirkuk and its surrounding area was seized, without firing a shot by Kurdish forces and added to Iraqi Kurdistan when the Iraqi army fled the region following the 2014 Northern Iraq offensive of a terror group called the Islamic State of Iraq and the Levant (ISIL), also known as Daesh and the Islamic State of Iraq and Syria (ISIS).

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At the request of Kirkuk Governor, Najmaldin Karim, on 14 March 2017, the Kirkuk Provincial Council adopted a resolution on March 28 to raise the Kurdish flag, alongside the Iraqi flag, on local government buildings. A spokesperson for the federal government and parliamentarians representing the Iraqi Turkmen Front called the act unconstitutional. On March 21, the United Nations Assistance Mission for Iraq (UNAMI) issued a press release expressing concern and cautioning against unilateral steps that jeopardized harmony among Kirkuk's many ethnic and religious groups. On March 26, 50 civil society representatives protested peacefully against the public position of the UNAMI in Erbil. The Head of the Department of Foreign Relations of the Kurdistan Regional Government, Falah Mustafa Bakir, also expressed concern about the stance of UNAMI during his meeting with the Special Representative¹¹.

Kirkuk Governorate is currently under the control of Iraqi government after the failed independence referendum by the KRG. It is noteworthy that Peshmerga Secretary General, Jabbar Yawar, said in April 2018 that joint meetings between Erbil, Baghdad and Washington were held over the return of Kurdish and Peshmerga forces to the disputed regions. Although the Iraqi joint operation forces commander denied reports that the Kurdish and Peshmerga forces are going to return to Kirkuk and other disputed regions over which both Baghdad and Erbil claim authority¹².

4. Diyala and other Governorates

11 Report of the Secretary-General Pursuant to Resolution 2299 (2016) S/2017/357 , 25 April 2017, para.17

12 <http://www.kurdpress.com/en/details.aspx?id=824>

Disputed territories include Khanaqin, Kifri and Baladrooz districts of Diyala Governorate, Tuz District which is currently part of Salah-al-Din Governorate and Badra District which is currently the part of Wasit Governorate¹³(See the maps in the annex).

It is noteworthy that disputed territories have been taken over several times by Kurdish forces (Peshmerga) and the Iraqi army as well as ISIL since 2003. Peshmerga, with the backing of the U.S.-led international coalition, took control of vast swaths of disputed territories during the war on ISIL since 2014. Iraqi forces began retaking the contested areas held by the Kurds in retaliation for the KRG's decision to hold an independence referendum in October 2017 despite strong opposition from Baghdad, the U.S. and regional powers. The Iraqi federal government took over some 20% of the territories controlled by the KRG after the October 2017 conflict between Iraqi forces and Kurdish Peshmerga fighters. Then American officials were quoted as saying that they had asked Baghdad not to allow its forces to enter the formal KRG territory. Despite their calls for no further advances, they acknowledged Baghdad's right to extend its control over any federal or disputed territories¹⁴.

Currently, the Iraqi government regains control over the city of Kirkuk, and over the towns of Daquq, Sinjar, Tuz, Khurmatu, Jalawla, AltunKupri, Khanaqin, Zummar, Makhmur, Rabia, along with surrounding oil fields and airports. The conflict led the Iraqi Kurds losing the Kirkuk oilfields as their main source of revenue.

13 For further information about the disputed territories and their demographic see: Kane supra note 6 at 57-67

14 <https://www.ft.com/content/4afe5c02-b578-11e7-a398-73d59db9e399>

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Secretary General of the Peshmerga Ministry JabarYawar told NRT he met with a joint US-UK delegation to discuss developments in Iraq and the region. “One of the topics of discussion was in regards to the potential return of Peshmerga forces to the disputed areas, which they had controlled since the beginning of 2014,” Yawar said. “The Global Coalition has also expressed support for the decision¹⁵” he added.

It is necessary to mention here that the Iraqi parliamentary election on 12 May 2018 was held just six months after a non-binding independence referendum in Iraqi Kurdistan in which 93% people voted in favor of independence. Following the parliamentary vote, the Kurdistan Democratic Party (KDP) and Patriotic Union of Kurdistan (PUK) are set to form a coalition in order to negotiate with Iraqi parties. The participation of these Kurdish parties is essential to form a new Government in Baghdad and it seems the return of Peshmerga to disputed territories is their precondition for the government formation.

B. National Legal Mechanism to Resolve Disputed Internal Boundaries

The basis for resolving Iraq’s territorial disputes should, in theory, is found in its 2005 Constitution. However, the article is ambiguous and can easily be interpreted as contradictory¹⁶. Article 140 provides that:

First:

The executive authority shall undertake the necessary steps to complete

¹⁵ <http://www.nrttv.com/EN/Details.aspx?Jimare=19433> At 30/03/2018

¹⁶ Samuel MORRIS, Khogir WIRYA, Dlawer ALA’ALDEEN, “The Future of Kirkuk: A Roadmap for Resolving the Status of the Governorate”, (September 2015) The Middle East Research Institute, at 7.

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

Article 140 of the Constitution refers to Article 58 of the Transitional Administrative Law (TAL) issued by the Iraqi Transitional Government in 2003. The Constitution mandates the implementation of the details mentioned in TAL Article 58¹⁷.

17Article 58 provides that : (A) The Iraqi Transitional Government, and especially the Iraqi Property Claims Commission and other relevant bodies, shall act expeditiously to take measures to remedy the injustice caused by the previous regime's practices in altering the demographic character of certain regions, including Kirkuk, by deporting and expelling individuals from their places of residence, forcing migration in and out of the region, settling individuals alien to the region, depriving the inhabitants of work, and correcting nationality. To remedy this injustice, the Iraqi Transitional Government shall take the following steps:

- (1) With regard to residents who were deported, expelled, or emigrated; it shall, in accordance with the statute of the Iraqi Property Claims Commission and other measures within the law, within a reasonable period of time, restore the residents to their homes and property, or, where this is unfeasible, shall provide just compensation.
- (2) With regard to the individuals of specific regions and territories, it shall act in accordance with Article 10 of the Iraqi Property Claims Commission statute to ensure that such individuals may be resettled, may receive compensation from the state, may receive new land from the state near their residence in the governorate from which they came, or may receive compensation for the cost of moving to such areas.
- (3) With regard to persons deprived of employment or other means of support in order to force migration, it shall promote new employment opportunities in the regions and territories.

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The December 31, 2007, deadline to implement Article 140 has now long passed. Many Iraqi nationalists began to contend that the Article is no longer standing. Sunni Arabs voted against it almost unanimously; they initially had boycotted the assembly charged with its drafting and were then excluded from the political deals underpinning its final form. This is particularly problematic for resolving the issue of the disputed territories because Sunnis make up a majority of the Arab population in the disputed areas. In contrast, the Kurdish parties strongly support the constitution; they had a well-planned and strategically successful approach toward shaping its drafting. The Kurds see the constitution as an almost holy text that, after eighty years of monarchy and dictatorship, finally guarantees their rights and autonomy in Iraq. Kurdish leaders wanted to restore the situation in the disputed territories to the status quo ante of 1968, the year of the second Ba'athist coup and the start of thirty-five years of uninterrupted rule by the party¹⁸.

(4) With regard to nationality correction, it shall repeal all relevant decrees and shall permit affected persons the right to determine their own national identity and ethnic affiliation free from coercion and duress.

(B) The previous regime also manipulated and changed administrative boundaries for political ends. The Presidency Council of the Iraqi Transitional Government shall make recommendations to the National Assembly on remedying these unjust changes in the permanent constitution. In the event the Presidency Council is unable to agree unanimously on a set of recommendations, it shall unanimously appoint a neutral arbitrator to examine the issue and make recommendations. In the event the Presidency Council is unable to agree on an arbitrator, it shall request the Secretary General of the United Nations to appoint a distinguished international person to be the arbitrator.

(C) The permanent resolution of disputed territories, including Kirkuk, shall be deferred until after these measures are completed, a fair and transparent census has been conducted and the permanent constitution has been ratified. This resolution shall be consistent with the principle of justice, taking into account the will of the people of those territories.

¹⁸ Kane *supra* not 6, at 11.

The logic of Article 140 flows from the Kurdish premise that historically Kurdish areas cleared of their populations through forced demographic change should be “reattached” to the Kurdistan region. This is motivated by a genuine sense of responsibility on the KRG’s part to protect Kurdish civilians who have been the past targets of genocide.

It is noteworthy that Kurdish leaders describe Kirkuk, the geographic and strategic epicenter of the dispute, as the heart of the Kurdish nation calling it “our Jerusalem.” Similarly, Arab politicians hold, *per contra*, the country’s current provincial boundaries to be sacrosanct and argue that any alteration will lead inexorably to the disintegration of Iraq. Some reject the term disputed territories altogether and, in a reference to the Kurdish presence outside the Kurdistan region’s official boundaries, call them the occupied territories¹⁹. Meanwhile, there are several instances in Iraqi history of failed efforts to negotiate comprehensive accords on Iraq’s Kurdish question, and any decision by Iraqi stakeholders to enter into a formal political negotiation will depend on a complex constellation of domestic, regional, and international factors²⁰. For example, Turkey strongly opposes the annexation of Kirkuk to the KRG because this may strengthen the Kurd’s aspiration to establish their own state.

Kirkuk Governorate contains a super-giant oil field, two giant oil fields, and gas deposits. Moreover, disputed districts claimed by the KRG contain a lucrative border crossing with Iran and a possible gateway for the Kurdistan region to Syria; it currently only borders Iran and Turkey. From a geographic standpoint, the areas that the KRG claims about militarily defensible topography, such as the Tigris River

19 Kane *supra* not 6, at 5.

20 *Ibid.*

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and the Jebel Hamrein mountain range, while the fertile Ninevah Plains, irrigated agricultural land in Kirkuk, and areas surrounding the Hamrein Lake in Diyala are strategically important in a country where only an estimated 13 percent of the land is arable²¹.

This article set out a three-step process of normalization, census, and referendum to determine the will of citizens in Kirkuk and other disputed territories by December 31, 2007.

1. Normalization

With regard to the process of Normalization, Article 140 of the Constitution refers back to Article 58 of the TAL. The law puts forward the ‘expeditious’ implementation of reversing: “... [t]he injustice caused by the previous regimes’ practices in altering the demographic character of certain regions, including Kirkuk...”

Article 58 TAL outlines the process of Normalization in a fairly detailed manner. It entails the accomplishment of four actions:

- a. Financial compensation,
- b. Nationality correction,
- c. Resolution of land disputes,
- d. Pre-Ba’ath administrative boundary restoration.

Neither TAL 58 nor Article 140 provides the detailed guidelines to undertake such steps with the result that ambiguous language has caused disagreement and contention among the constituents of Kirkuk. Furthermore, processes relative to the implementation of the Article require close scrutiny. For example, financial compensation was provided to those wanting to leave Kirkuk after 2003 on the condition

²¹ Ibid, at 13-14.

that families would leave the governorate within 40 days of receiving compensation²². However, there are claims that many received financial compensation yet failed to leave their residences, although, the total number remains unknown. It has even been claimed that some of those that

received compensation used the money to renovate their houses in Kirkuk. As for those returning to Kirkuk, the authorities claim that there is not sufficient land to be distributed to the beneficiaries²³.

In December 2007, the Article 140 Committee recommended to the Presidency Council that all districts that had been detached from Kirkuk should be restored to the governorate, including those controlled by both the KRG and the Iraqi government. These include the districts of Chamchamal, Kifri, Kalar and Tuz. This would restore Kirkuk to its 1975 boundaries²⁴.

Changing Kirkuk's current administrative boundaries is perceived by the Arabs and the Turkmens as a serious impediment to the implementation of Article 140. The Arabs and the Turkmens constituencies object to the restoration of the boundaries on the account that the issue is not limited to Kirkuk but also affects the whole of Iraq. For Kirkuk, to be separately dealt with and its previous boundaries reattached, the Arabs and Turkmens believe that a political agreement between all political parties is required, an unlikely scenario. On the other hand, the majority of Kurds are clearly in favors of border restoration. Kirkuk, as defined by 1975 boundaries, would provide the Kurds with a significant majority in the governorate.

22 A sum of 20,000,000 Iraqi Dinars

23 MORRIS and others, *supra* note 16 at 17

24 Peter BARTU "Wrestling with the Integrity of a Nation: The Disputed Internal Boundaries of Iraq" (2010), *International Affairs*, Vol. 86 No. 6, at. 1335

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In accordance with the Constitution, the Presidency Council is required to present suggestions about the changes of the administrative boundaries of Iraq to parliament. In 2011, the President of Iraq, Jalal Talabani, proposed to the Council of Representatives a bill which would annul any law issued by the previous regime in regard to boundary changes. However, this bill remains unaddressed in Iraq's Council of Representatives. In the case of Kirkuk, to restore its boundaries, Salah al-Din, Diyala, and Sulaymaniyah would all have to restitute areas back to Kirkuk. Boundary change would therefore be a long and complex process that may never be successful²⁵.

In December 2007, with the constitutional deadline for Article 140 approaching and no referendum in sight, the United Nations Assistance Mission for Iraq (UNAMI) obtained a no-objection agreement from the federal government and the KRG to initiate a process of the UN technical assistance to facilitate the implementation of Article 140.

2. Census and Referendum

The Iraqi Constitution only explicitly mentions the word "census" twice. Article 140 clearly mentions the holding of a census as part of the process to a referendum. A deadline was created for a census to be held in July 2007. This was missed, as was the Iraqi National Census scheduled for 17 October 2007.²⁶

A significant reason for the failure to hold a census was over whether to include a question to identify ethnicity. Such historical or ethnic questions can easily provide triggers for conflicts. A census in Kirkuk,

25 Morris and others, *supra* note 16 at 19

26 Liam ANDERSON and Gareth STANSFIELD, *Crisis in Kirkuk: The Ethno Politics of Conflict and Compromise* (University of Pennsylvania Press, 2009), at 268.

would help to identify its electorate, however, a number of steps must be taken to ensure that the voter registration is fair. In Kirkuk this is complex as it often relates to the personal history of each possible voter²⁷.

Defining who participates in a referendum is a highly contentious issue amongst Kirkuk communities. The Turkmen consider the majority of the post-2003 returnees as illegible to vote. The majority of the Turkmen representatives consented to the usage of the 1957 census as the means to determine eligible voters; however, their views are to use it within the current boundaries, a point which the Kurds disagree with.

Arab communities, on the other hand, deem any person with official documentation issued in Kirkuk, to be a citizen of the governorate and thus are eligible to partake in any process determining the future of the city. It is important to note that no official documentation has been issued in Kirkuk since 2003.

There is no unified Kurdish perspective in regard to voter eligibility. For example, views include considering those who have been living in Kirkuk for more than 25 years and or own property, as those who are able to take part in the referendum. However, a dominant Kurdish view is that the 1957 census with the inclusion of districts of Chamchamal, Kalar, Kifri and TuzKhurmatu should be used to identify individuals who are eligible to vote.

The 1957 census enjoys approval of both the Kurds and the Turkmen because it is believed to be the most accurate and thus reliable census conducted in Iraq. The demography change commenced in the

27 Similar problem may be seen in other cases such as organisation of the referendum in Western Sahara by the UN. This plan has led to the deadlock due to disagreements in relation to the voters list between Morocco and the POLISARIO Front. See: *The Legal Issues Involved In The Western Sahara Dispute The Principle of Self-Determination and the Legal Claims of Morocco*, Committee on the United Nations, New York City Bar, 2012

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following years and thus the censuses held later have very little credibility. The 1957 census is vehemently refused by Arab communities as a method of identifying voters' eligibility. If the 1957 census was employed, only a small percentage of the Arabs currently residing in Kirkuk Governorate would be able to vote. All who have settled in the governorate and are not 'original' Kikukis should not be able to vote²⁸.

In terms of voting boundaries, a range of perceptions have been outlined. This includes suggestions such as the governorate-wide referendum after retrieving the original administrative boundaries. Also, a district-by-district referendum is often put forward because some believe that it will mean that the outcome of a referendum would better represent the rights and the will of the people. A district-by-district or even sub-district-by-sub-district referendum could have the potential of generating further intricacies and fragmentations. If districts were to vote differently, a new boundary would need to be delineated. Therefore, a governorate-wide process within the current boundaries can be perceived as the most viable option. Nonetheless, to adopt this option, a consensus is required politically²⁹.

The presence of the international community has also been perceived as crucial in any agreement or consensus to be reached. Aside from catalyzing the attempts of reconciling the competing interests, involvement of the international community, more significantly the UN and/or the US garners further recognition of any future agreements. Iraq's Higher Electoral Committee (IHEC) is able to administer a future

28 Morris and others, *supra* note 16, at 20.

29 *Ibid.*, at 22.

referendum in Kirkuk and electoral assistance can be provided by the United Nations Assistance Mission to Iraq (UNAMI) through its Electoral Assistance Team (EAT).³⁰

There are territorial and administrative solutions that designate whether or not Kirkuk will reside within the Kurdistan Region, and whether Kirkuk receives any form of special administrative status after a referendum³¹:

- a. Kirkuk outside the KRI: Kirkuk would maintain its status as a governorate of Iraq, administratively controlled by the central government in Baghdad.
- b. Kirkuk as a Region: Kirkuk's status would be that of a region with the same powers and rights as any other federal region in Iraq.
- c. Kirkuk with Special Administrative Status inside the KRI: This scenario would place Kirkuk within the KRI geographically, while also providing it with administrative powers, different from other governorates.
- d. Kirkuk with Special Administrative Status outside the KRI: This option broadly puts Kirkuk outside of the KRI geographically but with special administrative powers. Kirkuk could be given devolved powers from the central government and be geographically a governorate, but with less direct influence from Baghdad and Erbil³².
- e. Kirkuk as Part of the KRI: This would place Kirkuk as a governorate within the KRI. It would be granted the same rights as other governorates that comprise the KRI. The KRG would then have both the administrative and geographical control of Kirkuk.

30 'Kirkuk Status Referendum Operational Concept', The Center for Democracy and Civil Society at Georgetown University, 2013, <http://ckro.georgetown.edu/resources/framework>

31 Ibid. at 23

32 Stefan WOLLF, "Governing (in) Kirkuk: Resolving the Status of a Disputed Territory in post-America Iraq", (2010) *International Affairs*, Vol. 86, No. 6, at 1376.

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- f. Interim Special Status: The staggered approach to special status would mean that Kirkuk becomes a specially administered region outside of KRG's control for 5 to 10 years. This period can be categorized as an "interim special status". After this period, and further confidence building measures between Kirkuk's communities as well as Erbil and Baghdad, there would be a final referendum to decide the geographical status of Kirkuk, within the KRG or not, keeping its special administrative status either way. The interim status has been used as a mechanism to settle protracted territorial conflicts³³.

III. United Nations Resolutions And Their Legal Consequences

In this section, we examine those UNSC resolutions which mentioned about Iraq's disputed internal boundaries and analyze their legal foundation and consequences.

A. United Nations Resolutions on Disputed Internal Boundaries

The Security Council in its Resolution 1500 which was adopted at its 4808th meeting on 14 August 2003, decided to establish the United Nations Assistance Mission for Iraq (UNAMI) to support the Secretary-General in the fulfillment of his mandate under Resolution 1483 in accordance with the structure and responsibilities set out in his report of 15 July 2003, for an initial period of twelve months. It is noteworthy that the UNSC extended the mandate of the UNAMI until 31 May 2019 in its last resolution (2421).

As we know, Resolutions generally consist of two parts:

a. Preamble

1. Presents the background or motive for the resolution

³³ Ibid., at 1377.

2. Begin with an italicized verb ending in -ing (e.g. *Recalling...*)

b. Operative Part

1. States the opinion of the organ or the action to be taken
2. Has numbered paragraphs
3. Operative paragraphs begin with verbs in the present tense (e.g. *Decides... Requests...*).

The Security Council initially used the phrase 'disputed internal boundaries' in resolution 1770 (2007). The Council decided in operative part (Paragraph 2) that the UNAMI advise, support and assist the government of Iraq in resolving some problems including 'disputed internal boundaries'. As circumstances permit, the Special Representative of the Secretary-General and the UNAMI, at the request of the Government of Iraq, shall:

".....Advise, support, and assist: the Government of Iraq and the Council of Representatives on Constitutional review and the implementation of constitutional provisions, as well as on the development of processes acceptable to the Government of Iraq to resolve disputed internal boundaries." (emphasis added)

It is necessary to say that the Security Council in Resolution 1883 (2009) had mentioned the phrase 'disputed internal boundaries' in an unnumbered preamble paragraphs for the first time as well:

"..... Underscoring the need for all communities in Iraq to participate in the political process and an inclusive political dialogue, to refrain from making statements and actions which could aggravate tensions, to reach a comprehensive solution on the distribution of resources, and develop a just and fair solution for the nation's disputed internal boundaries and work towards national unity."(emphasis added).

It is interesting to note that the UNSC repeated the above paragraph in Resolution 1936 (2010). Although Resolution 1830 (2008) was silent

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on the issue of disputed internal boundaries³⁴, the Council used the phrase ‘disputed internal boundaries’ twice in Resolution 2001 (2011) and reiterated the aforementioned paragraphs in Resolutions 2061 (2012), 2110 (2013), 2169 (2014), 2233 (2015), 2299 (2016), 2367 (2017) and 2421 (2018). In these latter resolutions, the Security Council has tasked the United Nations Assistance Mission for Iraq (UNAMI) for coordination between the Government of Iraq and the KRG in resolving disputed internal boundaries.

It is noteworthy to say that the Security Council in Resolution 2299 (2016) for the first time added the requirement of cooperation between the Government of Iraq and the Kurdistan Regional Government’ hence, it placed the KRG equal capacity with the Iraqi government:

“Underscoring the need for all segments of the Iraqi population to participate in the political process, in inclusive political dialogue, and in the economic and social life of Iraq, to refrain from statements and actions which could aggravate tensions, to reach a comprehensive solution on the fair distribution of resources, and to promote stability, develop a just and fair solution for the nation’s disputed internal boundaries and work to strengthen national unity, {*including through cooperation between the Government of Iraq and the Kurdistan Regional Government*} and stressing the importance of a comprehensive and inclusive Iraqi-led political process to support dialogue for all those who renounce violence, have no links to

34 “Underscoring the need for all communities in Iraq to reject sectarianism, participate in the political process and an inclusive political dialogue, reach a comprehensive solution on the distribution of resources, and work towards national reconciliation for the sake of Iraq’s political stability and unity,”

international terrorist organizations including ISIL, and respect the constitution,” (emphasis added).

“Stressing the importance of the United Nations, in particular the UNAMI, in advising, supporting and assisting the Iraqi people, including civil society, and the Government of Iraq to strengthen democratic institutions, advance inclusive political dialogue and national reconciliation according to the Constitution, ensure reconciliation efforts are coordinated, facilitate regional dialogue, develop processes acceptable to the Government of Iraq to resolve disputed internal boundaries,”.

It seems that the Security Council has obliged both parties (Iraqi government and KRG) to settle their disputes on the disputed internal boundaries peacefully in accordance with Iraqi constitution. The Security Council has vested the mission of coordination between the Government of Iraq and KRG in resolving disputed internal boundaries to the United Nations Assistance Mission for Iraq (UNAMI).

I analyze the binding character of the UN Security Council resolution in the next section.

B. Nature of United Nations Resolutions and their Consequences

The Security Council, a principal organ of the United Nations, is a political organ of limited competence, with certain exceptions, its powers and functions relate to the maintenance of international peace and security (for which the Members of the United Nations have conferred upon it primary responsibility).³⁵ The principal function of the Security Council is the maintenance of international peace and

35 Michael C. WOOD, “The Interpretation of Security Council Resolutions”, Max Plank Yearbook of United Nations Law, (2007), Volume 11, at 77.

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security, in the discharge of which the Council exercised both decision-making and executive powers³⁶. It seems, therefore, that the Security Council appears to be an oligarchic organ.³⁷

Under Article 25 of the UN Charter, “the Members States agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”. He the verb “agree to accept” refers to the overall consent given by states upon ratification of the Charter. The phrase should be read as expressing the idea that members are obliged to carry out the decisions. This view is corroborated by Art. 2(5) which contains a general obligation of members to give “every assistance in any action” the UN take in accordance with the Charter³⁸.

The Council’s decisions are binding on all UN members, also those who did not play any part in its adoption. The binding effect extends, as the ICJ (International Court of Justice) stated to those members of the Security Council which voted against it and those members of the United Nations who are not members of the Council. The binding effect is not based on consent to the concrete decision, in contradistinction to the binding effect of a treaty³⁹.

Whether we categorize those resolutions of the Security Council regarding Iraq, within the framework of Chapter VI or VII, the finding is the same. “There is nothing here in the titles of Chapters VI and VII which leads one to believe that they should be read, respectively, as

36 Bertrand G. RAMCHARAN, *The Security Council and the Protection of Human Rights*, (Hague: MartinusNijhoff Publisher, 2002), at 204.

37 Olivier de FROUVILLE, “On the Theory of the International Constitution” , in Denis ALLAND, Vincent CHETAIL, Olivier de FROUVILLE & Jorge E. VINUALES, eds., *Unity and Diversity of International Law, Essays in Honour of Professor Pierre-Marie Dupuy*, Boston:MartinusNijhoff Publisher, 2014), at 100.

38 Bruno SIMMA, Daniel ERASMUS KHAN, Georg NOLTE and Andreas PAULUS, eds., *The Charter of the United Nations*, (Oxford University Press, 2012), at 795.

39 Ibid.,at 799.

"recommendations for the settlement of disputes" and "decisions with respect to a breakdown of peace". Article 25 stands separately from both Chapters VI and Chapter VII. Its provision that UN members are bound by decisions of the Security Council flows from Article 24 (1) by which members confer on the Council's primary responsibility for the maintenance of international peace and security. In Paragraph 2 of Article 24, it is stated that the specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII. If Article 25 applied only to Chapter VII, one might perhaps have expected to see it located in that chapter. Moreover, there is some strength to the view that Articles 48 and 49 achieve a binding effect for Chapter VII decisions; and that if Article 25 refers to Chapter VII alone, then it is superfluous⁴⁰.

The binding or non-binding nature of those resolutions turns not upon whether they are to be regarded as "Chapter VI" or "Chapter VII" (they are in some ways a curious hybrid) but upon whether the parties intended them to be "decisions" or "recommendations."⁴¹

The International Court of Justice support above-mentioned approach in an advisory opinion on Namibia. The court said:

"It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with

40 Rosalyn HIGGINS, "The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?" (1972) *The International and Comparative Law Quarterly*, Vol. 21, No. 2, at 277-278.

41 *Ibid.*, at 281-282

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the functions and powers of the Security Council . . . The language of a resolution of the Security Council should be carefully analyze before a conclusion can be made as to its binding effect. In view of the nature of the powers of Article 25, the question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council⁴²”.

A broad distinction may be made between the provision of SCRs that take the form of recommendations and those that are mandatory. SCRs are by no means all of a kind, and the approach to interpretation may vary depending on their nature. Some are internal to the United Nations legal order, e.g. the recommendation for the appointment of a Secretary-General, recommendation concerning the UN membership, others are internal to the Security Council itself, e.g. adopting or amending the Provisional Rules of Procedure or setting up subsidiary organs. And there are a small number of resolutions that deal with substantive matters in a general way, e.g., resolution on Non-proliferation of weapons of mass destruction⁴³, United Nations peacekeeping operations⁴⁴, and threats to international peace and security caused by terrorist acts⁴⁵. But the great majority deals with a particular situation or dispute. In such cases, it is necessary to have as full a knowledge as possible of the political background and of the whole of the Council’s

42 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion {1971} I.C.J.Rep. 52-53

43 S/RES/2325 (15 December 2016).

44 S/RES/2378 (20 September 2017).

45 S/RES/2396 (21 December 2017).

involvement, both prior to and after the adoption of the resolution under consideration⁴⁶. The ICJ in its advisory opinion “*Effects of Awards of Compensation made by the United Nations Administrative Tribunal*”, attributed full legal effect to the GA decision creating the UN Administrative Tribunal, although there was no express provision for this power in the Charter. The court Said:

“There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of the future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise. But the contention that the General Assembly is inherently incapable of creating a tribunal competent to make decisions binding on itself cannot be accepted.”⁴⁷

We can conclude from the above-mentioned paragraph of the Court that the Iraqi nation can amend and revise the Constitution and even make new one and change the structure of the political system of its state, but as far as, this Constitution is in force, it is capable of creating obligation on the all segment of the Iraqi state including the government.

The aim of those articles of the constitution, to do justice as between the different segment of the Iraqi nation including Arabs, Kurds, Turkmens..., this is essential to ensure the national peace and security in Iraq.

46 Wood, supra note 35, at 79,

47 *Effects of Awards of Compensation made by the United Nations Administrative Tribunal. Advisory Opinion, {1954} I.C.J.Rep 47, at.61*

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Recommendations and, especially, decisions may have substantive effects⁴⁸. In other words, the effects operate at different stages of the normative process, either creating a substantive affect itself or merely repeat the provisions of the Iraqi Constitution.

Another question remains nonetheless to be determined: It should be noted to this question whether the Security Council decisions can bind other actors than states on the international plane, in this case, the regional Kurdish government.

In the case of *Kosovo*, the ICJ only found that RES 1244 was not addressed to the authors of the declaration of independence (Kosovo Regional Government), but to the member states and to the UN and its organs⁴⁹. The Court stated that it can “establish on a case-by-case basis for whom the Security Council intended to create binding legal obligations⁵⁰”.

It seems that Security Council has addressed both the Iraqi Government and the KRG to abide by the Constitution regarding to the determination of internally disputed boundaries. The Council expressly addressed the KRG in Resolution 2299 (2016).

The above analysis suggests that the UNSC possesses supervisory rights with respect to the observance of the Iraqi Constitution. According to the Council, the Iraqi Constitution has bound all ethnic and religious groups in Iraq including the government. It seems that the Iraqi government was under obligation to reach an agreement with the

48 Marko Divac ÖBERG, ‘The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ’, (2006), *The European Journal of International Law*, Vol. 16, No. 5, at 905.

49 The Court opined that there was no indication that the Council intended to impose a specific obligation to act or a prohibition from acting, addressed to such other actors (*Kosovo Advisory Opinion*, para. 115).

50 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, *Advisory Opinion* {2010} I.C.J., at 117.

KRG. This approach has been taken in a range of resolutions. Also, the Constitution of Iraq vests direct rights in Kurds within international law.

There is now growing support in some States for peaceful settlement between the Iraqi government and the KRG especially, the EU and the US pressure Baghdad and Erbil to resolve their disputes. Therefore, state practice endorses and reaffirms the content of those Security Council resolutions⁵¹. On 19 June 2016, the Foreign Affairs Council of the European Union issued a statement stressing that unilateral steps must be avoided and that all open questions must be resolved through consensual positions based on full application of the provisions of the Constitution of Iraq. The European Union also called on the federal Iraqi Government and the Kurdistan Regional Government to engage in dialogue on all issues across the political and economic spectrum, including the disputed internal boundaries⁵².

Someone may contend that these series of resolutions would set a dangerous precedent, but it is worth noting that the Security Council's decisions do not impose new obligations on the Iraqi Government but merely enforce the provisions of the current Iraqi Constitution specially Art. 140.

Another question that may be raised is whether the Security Council by adopting those resolutions on the disputed internal boundaries of Iraq has contravened the Article 2 (7) of the UN Charter or not?⁵³

51 www.basnews.com/index.php/en/news/iraq/256814

52 Report of the Secretary-General pursuant to resolution 2299 (2016),S/2017/592 ,11 July 2017, para.18

53 Article 2 (7) provides that : Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

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The second sentence of Article 2 (7) provides for an exception to the general rule of non-intervention by the Organization into the domestic jurisdiction of Member States. It ensures that the key function of the UNSC, namely the application of enforcement measures under Chapter VII, is not subject to the plea of domestic jurisdiction.

Enforcement measures as per Art. 2 (7) are not limited to military enforcement measures. While the term “enforcement measures” in Art. 53 of the Charter is mostly understood to exclude non-military sanctions, it is agreed that the same term in Art. 2 (7) includes all binding decisions which the UNSC makes under Chapter VII⁵⁴.

As already mentioned, the Security Council has vested the mission of coordination between the Government of Iraq and KRG in resolving disputed internal boundaries to the United Nations Assistance Mission for Iraq (UNAMI). It seems that this enforcement measure is compatible with the second clause of the Art. 2 (7).

Regardless of categorizing those resolutions of the Security Council within Chapter VI or VII, it seems that Council has not contravened Article 2 (7) of the UN Charter because that organ merely reiterates to execute the provision of the Iraqi Constitution regarding the settlement of the disputed internal boundaries, the prolongation of which would “likely endanger the maintenance of international peace and security”.

IV. Conclusion

Iraqi Kurdistan is governed by the Kurdistan Regional Government or KRG. In other words, the KRG has assumed governmental responsibility in the federal region of Iraq. The Arab-Kurdish dispute in Iraq is composed of several interrelated elements, including budget

54 Simma supra note 38, at 308.

power-sharing, contrasting views of the distribution of power within the Iraqi state, disagreement over how to conduct oil contracting and share oil revenues, and disputes over territories in northern Iraq. The greatest potential threat to Iraq's stability is the prospect of an Arab-Kurdish conflict over oil-rich Kirkuk and other disputed territories. Disputed Internal Boundaries refers to the territories of Northern Iraq which are regions defined by Article 140 of the Constitution of Iraq as being Arabized during the Baath Party rule. The basis for resolving Iraq's territorial disputes should, in theory, be found in its 2005 Constitution especially in Article 140.

The Security Council, initially, used the phrase 'disputed internal boundaries' in operative part of Resolution 1770 (2007) and then reiterated it in preamble paragraphs of Resolutions 1883 (2009), 1936 (2010), 2001 (2011), 2061 (2012), 2110 (2013), 2169 (2014), 2233 (2015), 2299 (2016), 2367 (2017) and 2421 (2018). This was the first time in its history the UNSC used the phrase of internal boundaries. The Council later added the requirement of cooperation between the Iraqi Government and the Kurdistan Regional Government in Resolution 2299 (2016) and as such it placed the KRG at equal capacity with the Iraqi government.

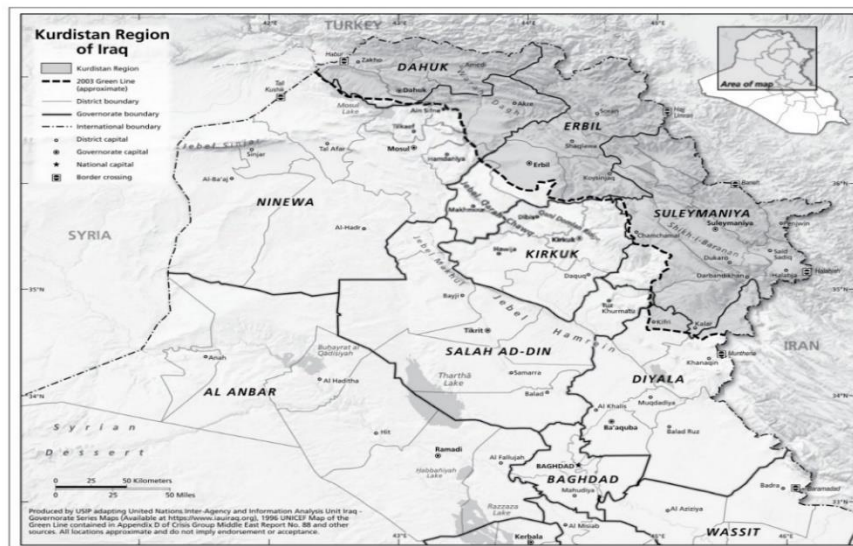
Under Article 25 of the UN Charter," the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

Recommendations and, especially, decisions may have substantive effects. In other words, the effect operates at different stages of the normative process, either creating the substantive effect itself or merely repeating the provisions of the Iraqi constitution.

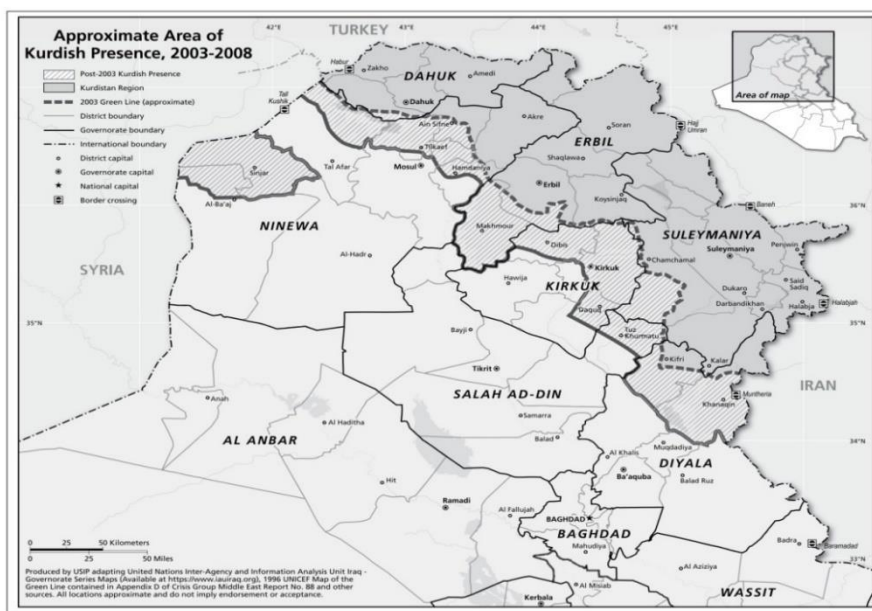
The Security Council in Resolution 2299 (2016) has addressed both the Iraqi Government and the KRG to abide by the Constitution of Iraq with regard to determining the internally disputed boundaries.

The Council's decisions, hence, do not impose new obligations on Baghdad but merely enforce the provisions of the current Iraqi constitution especially Article 140. Iraqi government, at the same time, has dual obligations due to observance of Security Council resolutions.

Map 1



Map 2



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