

# Revere and Adhere: Examining the Legality of Kurdistani Diplomatic Engagement

by Patrick Doherty '11

“You know, I still chuckle to myself about the last Arab League summit,” laughed Qubad Talabani, a hint of bemusement noticeable in his posh British accent.<sup>1</sup>

Such lightheartedness is more than understandable for Qubad Talabani. Raised in England by his grandparents while his father, former resistance leader and current President of Iraq Jalal Talabani, spent decades commanding armed Kurdish peshmerga in the mountainous northern reaches of Mesopotamia, Qubad knows all too well the difficulties the Kurds have faced at the hands of Baghdad-based central government. The irony of the occasion was not lost on him: “It was amazing to have Jalal Talabani, Hoshiyar Zebari, and Rozh Nouri Shawes – three Kurds – serving as the Iraqi delegation [to the Arab League].”<sup>ii</sup>

Qubad is himself a member of an increasingly comprehensive and responsive diplomatic corps with origins in northern Iraq’s Kurdish-majority governorates. Having previously represented his father’s party, the Patriotic Union of Kurdistan (PUK) in Washington, Qubad has spent almost a decade in America and has served as the Representative to the United States for the Kurdistan Regional Government (KRG) since the Region’s administrative unification in 2006.

Operating under the umbrella of the Department of Foreign Relations (DFR), his Washington office is one of a handful of KRG outposts that dot the map of the Western world. The Department’s officials are among the most articulate and polished that Iraqi Kurdistan<sup>1</sup> has to offer, and their representatives abroad consider themselves to be “the equivalent of an ambassador of a sovereign state.”<sup>iii</sup>

---

<sup>1</sup> When discussing Kurdistan, it is critical to define the various terms used. Many terms are used in numerous and sometimes conflicting instances, but the purpose of this article, they will be kept uniform, even if they may not always be consistent their usage in other publications. ‘Kurd’ or ‘Kurdish’ will refer to those comprising or representing the ethno-linguistic group. An ‘Iraqi Kurd’ is a member of this ethno-linguistic group with Iraqi nationality. ‘Kurdistan’ (also ‘Greater Kurdistan’) is the transnational region that maintains a Kurdish majority, which largely includes parts of Iraq, Turkey, Iran, and Syria. ‘Iraqi Kurdistan’ is the portion of Kurdistan that is within the current boundaries of Iraq. ‘Kurdistan-Iraq’ or ‘Kurdistan Region’ is the part of this region that is federally recognized as majority-Kurdish and consists exclusively of the governorates of Dohuk, Erbil, and Sulaimaniyah. The ‘Kurdistan Regional Government (KRG)’ is the political entity that governs Kurdistan-Iraq. Within Iraqi legislation, ‘Kurdistan’ and ‘Iraqi Kurdistan’ are intended to apply to Kurdistan-Iraq, not including areas of Greater Kurdistan found in Iraq but outside the region (namely, Kirkuk). For the purpose of this paper, the term ‘Kurdistani’ will refer to something or someone that is representative of Kurdistan-Iraq and the KRG, as opposed to the ethno-linguistic ‘Kurdish’ (the Kurdish language accounts for the difference between these two concepts; without creating this terminology, English makes no such distinction).

Yet with the emergence of a federal Iraq in the wake of the fall of the Ba'athist regime, the introduction of the Kurdistan Region and Iraqi Kurds into the international diplomatic community has raised some concerns. "It rattles people in Baghdad that the Kurds have more than just one person [both federal and regional diplomatic representation]," explained Joost Hiltermann of the International Crisis Group. In terms of diplomatic representation, he said, "Baghdad and Erbil still haven't worked out their differences."<sup>iv</sup>

After decades of terror at the hands of Saddam Hussein's regime, the Kurdistan Region is now beginning to flourish, developing critical diplomatic relationships and establishing itself on the international stage. However, this growth is not without controversy. Is their foray into international diplomacy legitimate? Does the DFR have any legal basis? And, most importantly, does any of this jeopardize the integrity of the unseasoned federal Iraqi constitution?

### BAGHDAD AND IRAQI KURDISTAN: A TUMULTUOUS RELATIONSHIP

The Kurdish narrative is one dominated by the idea of resistance: resistance to its neighbors, resistance to former President Saddam Hussein and, above all, resistance to the central government based in Baghdad. Inherently linked to this narrative is the Kurds' adoration of their mountains, to which the Kurds often refer to as "our only friend." The impressive topography of the Zagros Mountains stands in stark contrast to the plains and desert to their south. For years, it seemed as though the mountains doubled as a demarcation line in Iraqi politics, and recent history remains a major roadblock in creating a unified society.

#### 'A Golden Opportunity'

For Iraq's older generations, the trauma inflicted by Saddam Hussein's Ba'athist regime left a wound that has yet to be healed. His notorious Anfal campaign, largely considered a systematic and government-sponsored genocide against Iraqi Kurds, has no doubt created a shared identity amongst this abused population. On the streets of Erbil, the capital of Iraqi Kurdistan, the consequent cynicism and suspicion towards Baghdad is unsurprising.

What is surprising, then, is that amongst Iraqi Kurdistan's politically active population, the federal constitution born from the collapse of Saddam's regime appears to be revered as gospel. Support for the document and a federalist system has even been integrated into Article 7 of Kurdistan-Iraq's constitution:

"The people of Iraqi Kurdistan shall have the right to determine their own destiny, and they have chosen, out of their own free will, to make Iraqi Kurdistan as a federal region within

Iraq, as long as Iraq abides by the federal, democratic, parliamentary and pluralistic system, and remains committed to the human rights of individuals and groups, as stipulated in the Federal Constitution.”<sup>v</sup>

It seems that, almost on command, Iraqi Kurds can articulate these sentiments. The repeated assertion, “We are the largest nation without our own state,” is often accompanied by the claim that 2003 was the “golden opportunity” for independence.

Yet Iraqi Kurds are quick to declare commitment to federalism, if only for pragmatic reasons. “We don’t have access to the sea,” pointed out Ayoub Galaly, the head of the non-governmental Democracy Development Organization. “We have every right to statehood, but geography doesn’t make it realistic.” He further articulated that fear of neighboring Syria and Turkey also was a major factor.<sup>vi</sup> Former Deputy Prime Minister of Iraq and current KRG Prime Minister Barham Salih has publicly stated that “we all want independence,” but admitted that inclusion in the federal Iraq created by the 2005 constitution “is so much better for [the Kurds] – with all the resources of this country, a bigger entity.”<sup>vii</sup>

### Contextualizing the 2005 Federal Constitution

Since its establishment in the early twentieth century, the modern state of Iraq has continuously been confronted with the daunting task of unifying a heterogeneous and divided society. The American invasion and the ensuing fall of the Ba’athist government in 2003 forced Iraq to answer serious questions about its future, and at the focal point of these considerations lay the factional nature of the Iraqi demography. Preexisting social, political, ethnic and religious divisions became significantly more pronounced in the months following the outbreak of war, exacerbated by the absence of a post-war plan. The resulting power vacuum incited a struggle for political authority amongst Sunni and Shia Arabs, Kurds, Assyrians, Turkmen, Arab nationalists, secularists and even monarchists.

It is in this divided context that Iraqis drafted their current constitution. Despite the fact that the Law of Administration for the State of Iraq for the Transitional Period (TAL), Iraq’s post-2003 provisional constitution, had claimed that a future federal Iraq would “be based on geography and history” and “not on ethnicity or sect,”<sup>viii</sup> the 2005 draft was widely viewed as the cooperative work of Kurdish and Shia politicians and leaders, both of whom represented regions of Iraq that ostensibly sought and would benefit from autonomy and power at the expense of minority Sunni Arabs.<sup>ix</sup>

While the document was clearly a concerted effort to maintain stability and unity, it is still too early to determine its ability to maintain a cohesive and sustainable Iraqi polity. Provisions allowing for the development of autonomous

regions, from which the KRG derives its legitimacy, are arguably the most significant contribution of the constitution to the current political environment of Iraq.

The Kurds' historical tendencies towards pressing for self-government played a prominent role in the delicate process of concessions and compromise in the constitution-writing process. Representatives of Kurdish political parties had to do their best to show commitment to a future with a federal Iraq while still asserting their rights to certain levels of autonomy and self-government. In an attempt to appease the various ethnic groups in Iraq, the 2005 constitution grants federally-recognized regions a certain level of autonomy. However, the document also stipulates that these powers cannot impinge on authorities exclusively assigned to the federal government. In extending this autonomy to the governments that had developed in Erbil and Sulaimaniyah since 1991, the framers of the constitution had hoped to gain Kurdish support for a central government based in Baghdad.<sup>x</sup>

## SEMANTICS, SYNTAX, AND DIPLOMACY: TWO CONSTITUTIONS, MANY CONTRADICTIONS

### Foreign and Regional Representation in the Federal Constitution

Within the context of these Iraqi ethnic, linguistic, and religious divisions comes Section Five of the country's Constitution, entitled "Powers of the Regions." Article 117 of the federal constitution officially recognizes the "region of Kurdistan;" this acknowledgment appears to be either the result of lobbying during the writing process or an incentive to encourage Kurdish participation in a unified Iraqi government.<sup>xi</sup> The section grants other governorates and provinces the option to form regions, though as of the publication of this article, Kurdistan remains the only autonomous region of federal Iraq (after the failed 2009 attempt at the formation of a region based in Basra).<sup>xii</sup>

Article 121 of the federal constitution delineates the rights bestowed upon federally-recognized regions, including the rights to governance and budget allocation. According to foreign correspondent and author Quil Lawrence, before sending KRG President Masoud Barzani to the constitution-writing committee in Baghdad in 2005, the Kurdistan Parliament passed a resolution outlining the Kurds' minimum demands, among which was Kurdish representation in Iraq's foreign embassies.<sup>xiii</sup> Able to manipulate the proceedings "with the most democratic of excuses,"<sup>xiv</sup> the Kurds got their wish in fourth provision of Article 121: "The regions and governorates shall establish offices in the embassies and diplomatic missions, in order to follow up cultural, social and developmental affairs."<sup>xv</sup> Based on these terms, Lawrence writes, "Should things in Iraq start to go awry, a Kurdish attaché

with each Iraqi embassy in all the world's capitals would have a chance to spin the story their way.”<sup>xvi</sup>

Considering this clause, it is crucial to note that the first provision of Article 121 explicitly states that the regions have no jurisdiction in matters related to the “authorities stipulated in the exclusive authorities of the federal government,”<sup>xvii</sup> which are outlined in Article 110 of Section Four, “Powers of the Federal Government.” Amongst these authorities, the most curious are found in its first provision:

“First: Formulating foreign policy and diplomatic representation; negotiating, signing, and ratifying international treaties and agreements; negotiating, signing and ratifying debt policies and formulating foreign sovereign economic and trade policy.”<sup>xviii</sup>

While the federal constitution grants exclusive rights in foreign policy and diplomatic representation to Baghdad and explicitly states that regions may not infringe in any way on these exclusive rights, the constitution also requires that regions establish offices in the central government's diplomatic missions for social, cultural and developmental affairs. This language allows for, and even encourages, such varied interpretations amongst the regional and central governments that it may endanger its sustainability.

#### Another Set of Rules: the Constitution of Kurdistan-Iraq

The parliament of Kurdistan, enjoying limited autonomy under the no-fly zone imposed by coalition forces on Saddam, began work on a draft of the Constitution of the Kurdistan Region in 2002, which was approved on November 7 of that year on the condition that it would be revisited in the event of a regime change. Upon the ratification of the 2005 federal Iraqi constitution, the Kurdistan Parliament formed a 19-man committee to rework the Kurdistan draft constitution so as to conform to its national counterpart.<sup>xix</sup> Sherwan Haderi, the Chair of the Law Committee of the Kurdistan Parliament, stressed the importance of adhering to the principles of the Iraqi federal system, claiming the draft committee had gone to great lengths to maintain that the integrity of the 2005 federal constitution, and, by association, a unified Iraqi polity.<sup>xx</sup>

Like its federal counterpart, the Preamble of the Constitution of the Kurdistan Region reads like an indictment of the crimes Saddam's regime carried out against the Kurdish people, acknowledging the sacrifices of the Kurds who contributed to the “mission and goal to establish a developed and civilized Kurdish society” and claiming the region seeks “to build Kurdistan as a united nation for all.” However, the section's final paragraph echoes an oft-repeated Kurdish claim: “Now our choices have become unified and our will have [sic] converged with that

of the other components of the people of Iraq and its national forces for Iraqi Kurdistan to be a federal region within the federal state of Iraq.”<sup>xxi</sup> Article 7, cited above, emphatically reiterates this position.<sup>xxii</sup>

The constitution itself references many of the rights granted to regions by the federal constitution. For example, the first paragraph of Article 3 stresses,

“The Constitution and the laws of the Kurdistan Region are sovereign and supersede all laws issued by the Iraqi government outside of the exclusive jurisdiction of the federal authorities, as stipulated in Article 110 of the Constitution of the Federal Republic of Iraq.”<sup>xxiii</sup>

However, Haderi insists the federal constitution is still the basis for all law in Iraq. “When we wrote the Kurdistan constitution,” he said, “we took all measures to ensure that it followed the 2005 federal constitution, because that is the main principle of any federal system.”<sup>xxiv</sup> Secretary of the Kurdistan Parliament Farsed Ahmed concurred but also cited Article 115 of the federal constitution, under which “all powers not stipulated in the exclusive powers of the federal government” are granted to the regions and governorates. “If it is not exclusive, then it is regional,” he explained.<sup>xxv</sup>

Article 8 of the regional constitution discusses Kurdistan’s foreign affairs and diplomatic representation. In the first paragraph, the Article reads:

“International treaties and agreements, which the Federal Government enters into with any foreign state or party, and which affect the status or rights of the Kurdistan Region shall be effective in the Region if said treaties and agreements meet with the approval of an absolute majority of the Members of the Parliament of Iraqi Kurdistan.”<sup>xxvi</sup>

Nothing in the article addresses as to who determines whether a treaty or agreement “affects the status or rights” of Kurdistan, although when asked, Ahmed said any dispute would be determined by the federal Supreme Court.<sup>xxvii</sup>

However, Ahmed did claim that based on this article, the Kurdistan Parliament has the mandate to approve any and all international agreements between Baghdad and foreign governments.<sup>xxviii</sup> This point is expanded upon in the second paragraph, which reads:

“Treaties and agreements which the Federal Government enters into with foreign states, shall not be effective in the Kurdistan Region if they deal with matters outside the Federal Government’s exclusive jurisdiction, in accordance with Article 110 of the Federal Constitution, unless an absolute majority of the members of the Parliament of Iraqi Kurdistan approve the implementation of said treaties and agreements in the Region.”<sup>xxix</sup>

Considering the fact that Article 110 grants exclusive authority for any and all “international treaties and agreements” to Baghdad, it would appear as though there

is no possibility that any “treaties and agreements which the Federal Government enters into with foreign states” – which by definition are “international treaties and agreements” – would fall under matters outside Baghdad’s mandate. The third paragraph of Article 8 expands upon this concept, giving the Kurdistan Region the “right to enter into agreements with foreign states regarding issues that do not lie within the exclusive jurisdiction of the federal authorities” as outlined in Article 110, though this is qualified in the fourth paragraph, by which any such agreement is subject to federal approval.<sup>xxx</sup>

### Interpreting, Explaining, and Opining

When asked, Haderi and Ahmed struggled to offer a concrete example of a situation in which either the second or third paragraph of Article 8 would be applicable. Both resorted to quoting Article 115 of the federal constitution. Specifically, Ahmed cited the clause under which “priority shall be given to the law of the regions ... in case of dispute.” This dispute would have to have some credible constitutional basis, however, and regional law cannot simply override the federal constitution in the event of a contradiction.<sup>xxxi</sup>

“The federal government decides broad concepts of foreign policy,” Ahmed said. “We cannot leap over these policies. Within these policies, however, we can make agreements so long as it does not contradict the broader policy [of the federal government.]”<sup>xxxii</sup> It must be noted that this explanation still does not address the second or third paragraphs of Article 8, nor does it have a basis explicitly outlined in Article 110 of the federal constitution.

Michael J. Kelly, the Associate Dean of International Programs and Faculty Research and Coordinator of the International and Comparative Law Program at Creighton University School of Law, served as a consultant to Erbil in the draft-writing process of the Kurdish Constitution. In a phone conference, Kelly expressed his doubts over the relationship between Baghdad and Erbil. “[The current arrangement] is probably not sustainable,” he said, “because the Iraqis and the [Kurdistanis] are going to interpret [the federal constitution] differently.” Kelly stressed that an absence of a means for legal enforcement further complicates the situation. “Without courts, it’s two political arguments and no solution.” Kelly continued, “There’s language in the [regional] constitution that trumps central law. Eventually [the Kurdistanis] will run into an Iraqi federal court that says otherwise.”<sup>xxxiii</sup>

Kelly admitted this has significant implications for Kurdish foreign policy. “[Right now], there’s a disconnect between the *de jure* and the *de facto* systems,” he said of Iraqi and Kurdistanis foreign relations. “The US consulate in Erbil is dealing with the KRG,” and not with the federal government, according to Kelly. “From the

KRG's point of view," he remarked, "they [are hosting] their own ambassadors," which in practice seems to be the case.<sup>xxxiv</sup>

Kelly believes the KRG, though empowered by the federal Iraqi constitution, "sees it in their interests to have a weaker Iraq. They view it as a zero-sum game – a weaker Baghdad equals a stronger Kurdistan [Region], and vice versa." Because he believes Erbil "will always want a weaker Baghdad," Kelly explained that they "negotiate on international stage for [Kurdistani] interests and not Iraqi interests."<sup>xxxv</sup>

Since the 2005 federal constitution was passed, Kelly claims Masoud Barzani and the KRG have been "interested in shoring up the image of Kurdistan internationally." Kelly cited Barzani's frequent meetings and photo-ops with foreign heads of state, specifically King Abdullah of Saudi Arabia, describing them as "not exactly people a regional governor should be engaging with." However, though the Kurdistan leadership is "about as subtle as the Soviets," Kelly called them "incredibly cagey, which is how they pulled off what they pulled off constitutionally."<sup>xxxvi</sup>

## EXAMINING THE KRG DEPARTMENT OF FOREIGN RELATIONS

Since the mid-1970s, various Kurdish political parties have maintained contact with Western governments and rivals of Saddam, hoping to topple his Ba'athist regime. Throughout the 1990s and into the early 2000s, the Barzani-dominated Kurdistan Democratic Party (KDP) and the Talabani-led Patriotic Union of Kurdistan (PUK) both maintained their own representatives to governments abroad. In an attempt to promote Kurdistan-Iraq internationally, this tradition has been continued and the practice systematized with the creation of the KRG's own version of the State Department.

### The Diplomacy of Erbil

In the short time since the ratification of the 2005 constitution, Erbil has undoubtedly presented its own interpretations of and intentions for the document—and not only through its Kurdistan-Iraq draft constitution. Citing Paragraph 4 of Article 121 of the federal constitution, Executive Order No. 143 was issued by the KRG's Council of Ministers on 25 January 2009, officially creating the Department of Foreign Relations. Then-KRG Prime Minister Nechirvan Idris Barzani signed the order into law, which empowers the Department of Foreign Relations to carry out the following duties, among others:

"A – Strengthening the position of the Kurdistan Regional Government with foreign countries in the fields of politics, culture, social affairs, economy, and development..."



B – Supervising the Kurdistan Regional Government’s overseas offices and endeavoring to strengthen KRG relations...

C – Facilitating the missions of foreign representatives within the Kurdistan Region, and endeavoring to promote the Region’s bilateral relations...

D – Supervising the visits of foreign delegations to the Kurdistan Region by providing assistance with accommodation and agendas...

I – Cooperating and coordinating with international companies and foreign investors in order to stimulate economic activity and enhance investment in the Region.”<sup>xxxvii</sup>

Accompanying each of the first five duties listed is the qualifier “in coordination with the Ministry of Foreign Affairs of the Federal Republic of Iraq,”<sup>xxxviii</sup> implying subordination to the federal government in terms of foreign policy and diplomatic representation.

The Department claims on its website to “work in concert” with Baghdad’s Foreign Ministry “to further activities of the country and the Region abroad.” The same page quotes Falah Mustafa Bakir, Head of the Department of Foreign Relations, outlining the Department’s vision to “facilitate mutually beneficial partnerships between the Kurdistan Region and members of the international community.”<sup>xxxix</sup> Given the federal constitutional limitations outlined in Article 110, it is vague as to what constitutes ‘mutually beneficial partnerships’ and how the Department anticipates it can ‘facilitate’ said relationships.

The DFR does, however, claim to have “served as a conduit for international diplomats and business representatives,” which, through the promotion of direct foreign investment, has led to a recent “rapid expansion of foreign representations in the region.” It is also the self-described “main point of contact between the Kurdistan Regional Government and offices maintained by foreign governments in Erbil.”<sup>xl</sup>

One of the primary duties is the oversight of foreign representative offices abroad. The DFR fleet of missions includes bureaus in Australia, Austria, France, Germany, Iran, Italy, Spain, Switzerland, the United Kingdom and the United States, as well as a mission to the European Union.<sup>xli</sup> Of these, only the office in Bern, Switzerland is in the same immediate neighborhood as its Iraqi counterpart. In the case of Paris and Rome, the KRG office is closer to the heart of the city than the federal embassy. The KRG Representation to Australia is not in the same city as the Iraqi Embassy – while the latter is in the capital of Canberra, the former is in Sydney, a city almost thirteen times larger. Furthermore, Baghdad does not maintain an office with the specific mandate of liaising with the European Union in Brussels.<sup>2</sup>

---

<sup>2</sup> The Iraqi Ministry of Foreign Affairs does have an Embassy to Belgium in Brussels, but according to the Ministry’s website, it is only that. For comparative purposes, the Representative (Consulate) of the Republic of Iraq in New York, for example, is distinguished on the Ministry’s website from the Permanent Mission of Iraq to the United Nations, also in New York. No such distinction is made for the Embassy in Brussels.

## Choice Words

In a meeting at Department of Foreign Relations in Erbil, Bakir eagerly announced that he had recently returned from a trip to Venice, where he had negotiated a memorandum of understanding (MOU) between the KRG and the Veneto region. According to Bakir, all such bilateral MOUs must be approved by Baghdad, which he said has yet to reject any such negotiated accord. “We want credibility,” he explained, “so we [the KRG] don’t want to go against the [federal] constitution.” In maintaining this position, Bakir also said he communicates with the Ministry of Foreign Affairs in Baghdad daily.<sup>xlii</sup>

Bakir described the MOU as an establishment of “economic, political, and cultural ties” between the two regions, but when others referred to it as an “agreement,” he was quick to correct them. “An MOU is not an agreement, it is less specific,” Bakir said, offering as a theoretical example a document outlining ways to encourage mutual investment.<sup>xliii</sup> This was an interesting play at semantics, especially considering that the Kurdistan Region’s constitution gives the KRG the right “to enter into agreements,” as cited above.

A similar situation arose regarding the term “minister.” Given that the DFR is not a formal ministry, KRG officials were quick to stress that Bakir not be referred to with this title, although a few would occasionally refer to him as such unintentionally. When discussing foreign representation quarrels between Erbil and Baghdad, even Aydın Selçen, the Turkish Consul General in Erbil, emphatically clarified the wording of the title, saying that “by law,” the holder of Bakir’s position could not be called a minister because the KRG is adhering to the federal constitution. Selçen went on to describe Bakir as “a good friend” with whom he enjoys both good personal and official relations. In explaining all this, the Turkish representative neglected to comment on any potential cleft between the DFR and the federal constitution or the federal Ministry of Foreign Affairs.<sup>xliv</sup>

This emphasis on semantics is interesting, considering both that there is no specific reference to the government titles in question, as Selçen implied, and that, in practice, Bakir and his office are a *de facto* ministry. The first paragraph of Executive Order No. 143 describes the DFR as “a Department that falls under the Premiership of the Council of Ministers of the Kurdistan Region of Iraq,”<sup>xlv</sup> as does every other official KRG Ministry. In addition, Bakir is one of four KRG officials listed on the government’s website as “senior officials with ministerial rank;”<sup>xlvi</sup> the other three are the Secretary of the Cabinet, Chairman of the Investment Board, and President/Diwan of the Council of Ministers. The DFR is the only government entity under the KRG Council of Ministers<sup>3</sup> with the denomination of “Department.”<sup>xlvii</sup>

---

<sup>3</sup> Essentially a chief of staff

## Addressing the Legal Question

After meeting Bakir in Erbil, it became apparent that the relationship between his Department and Article 121 of the federal constitution needed some clarification. Tawfiq Rahman Hamad, Directorate of KRG Offices Abroad, offered the Department's official interpretation of the provision on Bakir's behalf. According to Hamad, paragraph 4 of Article 121 "guarantees that the KRG will be allowed representation within the federal embassies." However, more controversially, Hamad explained that "this paragraph does not limit the KRG's foreign economic and social representation to offices within these embassies."<sup>xlvi</sup> The paragraph in question, as shown above, offers the regions the opportunities to "follow cultural, social and developmental affairs" through their offices in the embassies but neither permits nor limits economic relations. Meanwhile, Article 110 stipulates that the federal government has exclusive authority over "formulating foreign sovereign economic and trade policy."

Furthermore, this interpretation essentially means that the DFR believes Article 121 ensures there will be KRG representation in federal Iraqi embassies, but does not prevent them from establishing their own missions to further KRG aims. Following this logic, the existence of the DFR is not directly related to Article 121, a point that also made.<sup>xlix</sup> This is inconsistent with the preface to Executive Order No. 143, however, which reads: "Pursuant to Paragraph 4 of Article 121 and relevant Paragraphs and Articles of the permanent Constitution of Federal Iraq, ... we have decided the following..." Here, the official order itself from which the DFR derives its mandate cites Article 121 as the basis for its authority, although it is important to note that many features of the DFR predate this executive order.

Abdulhakeem Khasro Jawzal, a PhD candidate and Assistant Instructor at the public Salahaddin University in Erbil, offered another, only marginally different interpretation: "The Iraqi constitution says there should be Kurdish representation. [Executive Order No.] 143 is based on this." Although Jawzal noted that Article 110 gives Baghdad the exclusive right to determine international policies, he indicated that the "implementation [of these policies] into procedures are for the regions to decide."<sup>li</sup>

This interpretation was rather consistent amongst Kurdistan officials. Bakir posited that the DFR is not "formulating" foreign or economic policy but rather implementing federal policy on behalf of the KRG.<sup>lii</sup> In a phone interview, Qubad Talabani echoed these claims. "The [federal] constitution delineates that formulating foreign policy is Baghdad's prerogative," he explained, but qualified this by saying it was not necessarily their exclusive authority to execute the argument. "This is not an argument we are making," he added, "just a possible legal one."<sup>liii</sup>

Following this logic, DFR officials believe they are still working within the framework of the federal constitution despite maintaining offices separate from the federal embassies. The Department of Foreign Relations maintains a relationship with the federal Ministry of Foreign Affairs via a designated coordinator, and Jawzal explained that the DFR also has “set up a section to support the coordinator’s role in maintaining this relationship.” He also noted that “a committee has been formed to determine the nature and mechanics of the KRG’s representation within the Federal Ministry,” but that to date this committee has not yet completed its mission.<sup>liv</sup>

Othman Ali, Jawzal’s colleague at Salahaddin University, described the KRG perspective as three-pronged. First and foremost, citing its recognition and legitimacy by the federal constitution, the KRG is a legal entity, whose policies must be recognized both by Baghdad and by the international community. Second, Ali stressed the Kurdish experience of genocide, specifically the Ba’athist regime’s use of chemical weapons against Iraqi Kurds in Halabja in 1988 and the effect it has had on both the people and the region. Third, he cited UN Resolutions 688, 1514 and 1880, all of which “emphasize the federalism of Iraq. In spite of these resolutions and the federal constitution,” he continued, “the central government is not coming forward to solve power-sharing, resources and boundary disputes.” It is because of this, Ali reasoned, that the KRG must be represented internationally in order to protect the rights of its citizens. In Professor Ali’s opinion, diplomatic relations could coax foreign governments to “rally for us to Baghdad from abroad.”<sup>lv</sup> A slight sense of distrust of Baghdad seemed common amongst the legal and political scholars at Salahaddin and in the Kurdistan Parliament.

Ali used international comparisons to lend some legitimacy to Iraqi Kurdistan’s position. “There are three types of federalism,” he said, distinguishing them based on varying levels of international diplomatic engagement. Ali grouped Iraq with states like the United Arab Emirates, Brazil, Switzerland, Belgium and Canada, given their regional representation abroad.<sup>lvi</sup>

While some of the Salahaddin professors felt the constitutional provisions are straightforward, others disagreed. “Unfortunately, Article 110 is so generalized,” lamented Dr. Hussain Tawig Fayzolla, Dean of Salahaddin’s College of Political Science. “There are problems in its legal explanation.” He specifically cited the wording of “treaties and accords,” asking, “Where is the limit?” He continued, “The way to deal with legal contradictions is that we should be able to go to the federal courts,” though he soon thereafter questioned the validity of federal court decisions because of its supposed politicization.<sup>lvii</sup>

Meanwhile, Asow Muhammad questioned the existence of any dispute. “We have not seen any complaint from the central government concerning foreign

policy,” he said. “It’s not a central issue.”<sup>lviii</sup> His opinion echoed those of several KRG spokesmen interviewed.

### Kurdistan Abroad

When meeting one of the DFR’s representatives, it is as much from the general presentation as the particulars of the interview that one gains a more complete understanding of the KRG’s foreign relations. Though born to a prominent Kurdish political family – her father served as KRG Deputy Prime Minister from 1999 to 2004 until he was assassinated alongside her brother that year – Bayan Sami Abdul Rahman was raised in the United Kingdom from the age of 11, ultimately earning a degree in history from the University of London. Her impeccable British accent is accompanied by an articulacy that no doubt lent itself to her fifteen years as a journalist for the *Financial Times*.<sup>lix</sup> Given Rahman’s extensive education and experience, it is easy to understand why the KRG appointed her as their High Representative to the United Kingdom in 2005.

A few days before our interview, our delegation had been introduced to Rahman at a restaurant at the Erbil International Hotel (commonly referred to as the Sheraton), where she was accompanied by a number of British parliamentarians. When later describing the meeting, the High Representative painted a picture of her office that was reminiscent of a lobbying group, frequently meeting with all-party parliamentary groups<sup>4</sup> to further the KRG’s interests vis-à-vis the United Kingdom. “From [the British] perspective,” she said, “it is in the UK’s interest to have good relations and an economic opportunity,” particularly with this unique “majority-Muslim, emerging democracy.”<sup>lx</sup>

Rahman described herself and her colleagues within the DFR as diplomatic envoys<sup>lxi</sup> – a term also used by Qubad Talabani<sup>lxii</sup> – but lamented the lack of diplomatic status, citing unresolved constitutional issues related to Article 121. However, “in practical terms,” she noted, “in London it doesn’t make a difference. We still have full access,” pointing to her inclusion at an Arab ambassadors reception by the Conservative Party (who apparently failed to make the ethnic distinction). Like Professor Ali, she also compared Kurdistan-Iraq’s own representation to that of Catalonia, Flanders, Quebec, and Taiwan – all of which maintain a corps of representatives in London that form a sort of diplomatic union of the “have-nots.”<sup>lxiii</sup>

Unlike the DFR in Erbil, Rahman said that her office does not maintain daily contact with the Iraqi embassy in London, saying simply, “We don’t need to. We’re much more proactive anyways.” In a certain sense this is absolutely true; the

<sup>4</sup> Similar to Congressional subcommittees in that legislative representatives from various political parties consider specific matters, be they geographic (e.g. China or Brazil) or subject-oriented (Armed Forces or Human Trafficking).

Iraqi embassy, as a formal diplomatic representative, files into line like every other embassy representing sovereign states in London. The KRG representation is much more nimble, not only capable of lobbying to the aforementioned All-Party Caucus Groups in parliament, but also able to meet with potential investors and essentially sell the region as a good place to do business. Rahman was acutely aware of this and distinguished her role from the typical bureaucratic structure of diplomacy, noting “we have more autonomy than an embassy... We report to the Department of Foreign Relations and to President Barzani’s office, but I don’t need permission for 99 percent of what I do.”<sup>lxiv</sup>

Qubad Talabani, her counterpart in Washington, agreed. “The job was different when I first took it,” he said. When he was first posted to the United States, Talabani explained, “We [the PUK] were a rebel group, so everything was very political.” With the inception of a federal Iraq, Talabani said the focus has transitioned to a primarily cultural and economic one, but still noted the uniqueness of his position. “A KRG representative’s job is so much easier [than working for the Iraqi embassy],” since he is able to avoid over-bureaucratization.<sup>lxv</sup>

“There are advantages to this sort of autonomy and trust,” Rahman said, though also conceding that, at times, “there is a disadvantage in the lack of feedback from Erbil.” She did say, however, that her office was at least in contact with the Department of Foreign Relations headquarters in Erbil on a daily basis.<sup>lxvi</sup>

Contrary to her typically calm and composed demeanor, Rahman responded passionately to the suggestion of a constitutional discrepancy between Baghdad and Erbil concerning foreign representation. “We shouldn’t have to wait for the federal government,” she said. “We have been oppressed for too long. We want to bring the rest of Iraq with us.”<sup>lxvii</sup>

### Two Offices, One Nation?

Concerning the physical location of the representatives’ offices, Rahman claimed that the KRG does not interpret the clause as requiring the two to be physically in the same building. Surprisingly, much like Professor Ali, Rahman cited Catalonia, Flanders and Quebec as examples of regions with representation in London separate from their national embassies.<sup>lxviii</sup> In similar fashion, Hamad also sought to legitimize by comparison, citing Quebec, Catalonia and Taiwan as examples of “regions around the world that maintain independent international offices.”<sup>lxix</sup>

Such comparisons ignore the fact that these regions operate under different historical circumstances and, more importantly, different national constitutions. Though they offer some sort of precedence for regional representation in

geopolitics, these arrangements – such as that between Catalonia and Madrid or Quebec and Ottawa – have little bearing on Kurdistan-Iraq when it comes to a question of legality. All did say, however, that based on its own interpretation of the constitution, the KRG cannot have official relations with any state or international organization that Baghdad does not. Recognition of this limitation was often introduced to begrudgingly explain why the KRG does not maintain a relationship with Israel, despite the fact that it supports a two-state solution.

Nevertheless, the KRG does maintain a Mission to the European Union in Brussels. While Baghdad hosts a delegation on behalf of the European Union and maintains official relations with the continental organization, it does not have an office with the mandate of Mission to the EU, as noted above. Bakir acknowledged this, but since the office was opened prior to 2005, he referred to Article 141 of the federal constitution.<sup>lxx</sup> According to this article,

“Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and decisions issued by the government of the region of Kurdistan, including court decisions and contracts, shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with [sic] the Constitution.”<sup>lxxi</sup>

In a follow-up email, Hamad similarly cited Article 141. “This article,” he wrote, “reinforces the KRG’s right to maintain its international offices so long as their work does not conflict with the work of the federal Ministry of Foreign Affairs or otherwise violate the constitution.”<sup>lxxii</sup>

Given the final clause, it is unclear if, despite its establishment in the late 1990s, the continuation of the DFR’s Brussels-based mission contradicts the federal constitution. However, Bakir did say that his Department is in talks with Baghdad to validate all of their offices, so as to alleviate any potential sources of political tension or discrepancies.<sup>lxxiii</sup> Such an effort alone reveals that the DFR both recognizes the issue and confirms Talabani’s assertion that the KRG is not “working against the federal state.”<sup>lxxiv</sup>

## THE CHANGING FACE OF GEOPOLITICS

Rahman remarked that, with such a young federal constitution and the lingering effects of the 2003 invasion and ensuing civil war, everyone is still trying to decipher federal Iraq’s place in geopolitics.<sup>lxxv</sup> Diplomatic representation of governments based in both Baghdad and Erbil fit within this complicated and unfinished puzzle.

Because of the novelty of the federal constitution, the levels of autonomy given to federally-recognized regions and some vague language, Iraq finds itself

in a precarious position. Despite the relative decrease in violence and the restoration of law in Iraq, the political implications of a “state-within-a-state” and certain ambiguous elements of the federal constitution will be determined in the coming years. Diplomatic engagement and the development of foreign relations on the part of the KRG will have a serious impact on the viability of a unified Iraq and also offer substantial insight into Kurdish visions of and commitment to a federal Iraqi polity.

The Kurdistan Region’s inclusion and participation in a federal Iraq is still a point of contention. In a 2005 referendum, 98 percent of voters of Iraqi Kurdistan preferred independence to inclusion in Iraq.<sup>lxxvi</sup> Talabani said that he believed that at the aforementioned Arab League summit his father and his Kurdish colleagues represented Iraq “admirably,” much to the chagrin of the Kurdish streets. But he also pointed out that this position is only temporary. “It’s only a matter of time before the President is Arab,” he said, which he believes is a positive feature of the federalist system. It is in these early stages of that system, however, when Talabani believes politicians must “address Kurdish concerns.”<sup>lxxvii</sup>

Selçen credited Condoleezza Rice with creating a shift in geopolitics and diplomatic relations. During her tenure as US Secretary of State, she began an initiative to open a mission in all cities with a population exceeding one million people. Consequently, Selçen said that the logistics of international relations have become different and that “diplomacy has a more light-footed approach.”<sup>lxxviii</sup> Rahman and Talabani are undoubtedly manifestations of this. On behalf of the DFR, they have done a service not only to the Kurdistan Region, but also to the nation of Iraq as a whole by presenting it through a prism that differs from that of the war-torn images shown on Western news outlets.

However, since the ratification of the 2005 federal constitution, control of government ministries has essentially been divided along sectarian lines. The federal Ministry of Foreign Affairs is one of the ministries nominally under “Kurdish” control, with the KDP’s Hoshiyar Zebari at the head. Perhaps it is for this reason the DFR has yet to become a source of major conflict between Erbil and Baghdad. Nevertheless, much like the presidency, Zebari’s hold on this position is not permanent. With Kurdish diplomats representing Iraq internationally and the KRG sending its own envoys across the globe, there is a distinct possibility of alienating the rest of the Iraqi populace, in particular its primarily-Shi’a Arab majority. Addressing “Kurdish concerns” cannot be done at the expense of the whole of Iraq.

In order to ameliorate a potential source of conflict, the DFR must establish the nature of its relationship with Baghdad. It must seek to validate its offices abroad, a measure that Bakir has said is already in motion. However, approval from the current Kurdish-controlled Ministry of Foreign Affairs is not necessarily sufficient in preventing contention. The fact remains that the constitutionality of



the DFR is uncertain and the interpretations varied. A rift of this nature has the potential to become a point of contention between the KRG and non-Kurdish or non-Kurdistani political parties. Given the KRG's insistence on their reverence for and allegiance to the 2005 federal constitution, their adherence to its principles is necessary for the integrity and sustainability of both the document and a unified federal Iraq.

- 
- <sup>i</sup> Qubad Talabani. In discussion with the author. 18 February 2011.
- <sup>ii</sup> *Ibid.*
- <sup>iii</sup> Bayan Sami Abdul Rahman. In discussion with the author. 10 January 2011.
- <sup>iv</sup> Joost Hiltermann. In discussion with the author. 15 November 2010.
- <sup>v</sup> Constitution of the Kurdistan Region, Iraq (Draft), Article 7.
- <sup>vi</sup> Ayoub Galaly. In discussion with the author. 15 January 2011.
- <sup>vii</sup> Quil Lawrence. *Invisible Nation* (New York: Walker & Company, 2008), p. 312.
- <sup>viii</sup> Charles Tripp. *A History of Iraq* (Cambridge: Cambridge University Press, 2007), p. 286.
- <sup>ix</sup> Tripp, 301.
- <sup>x</sup> *Ibid.*
- <sup>xi</sup> Constitution of Iraq, Section Four, Article 117.
- <sup>xii</sup> "Basra's bid for autonomy stalls." CNN. 21 January 2009. <<http://edition.cnn.com/2009/WORLD/meast/01/21/iraq.basra.petition/index.html>> (19 December 2010).
- <sup>xiii</sup> Lawrence, 268.
- <sup>xiv</sup> *Ibid.*
- <sup>xv</sup> Constitution of Iraq, Section Five, Chapter One, Article 121.
- <sup>xvi</sup> Lawrence, 270.
- <sup>xvii</sup> Constitution of Iraq, Section Five, Chapter One, Article 121.
- <sup>xviii</sup> Constitution of Iraq, Section Four, Article 110.
- <sup>xix</sup> Farsed Ahmed. In discussion with the author. 16 January 2011.
- <sup>xx</sup> Sherwan Haderi. In discussion with the author. Erbil, Iraq. 16 January 2011.
- <sup>xxi</sup> Constitution of the Kurdistan Region, Iraq (Draft), Preamble.
- <sup>xxii</sup> Constitution of the Kurdistan Region, Iraq (Draft), Article 7.
- <sup>xxiii</sup> Constitution of the Kurdistan Region, Iraq (Draft), Article 3.
- <sup>xxiv</sup> Sherwan Haderi.
- <sup>xxv</sup> Farsed Ahmed.
- <sup>xxvi</sup> Constitution of the Kurdistan Region, Iraq (Draft), Article 8.
- <sup>xxvii</sup> Farsed Ahmed.
- <sup>xxviii</sup> *Ibid.*
- <sup>xxix</sup> Constitution of the Kurdistan Region, Iraq (Draft), Article 8.
- <sup>xxx</sup> *Ibid.*
- <sup>xxxi</sup> Farsed Ahmed.
- <sup>xxxii</sup> *Ibid.*
- <sup>xxxiii</sup> Michael Kelly. In discussion with the author. 11 November 2010.
- <sup>xxxiv</sup> *Ibid.*
- <sup>xxxv</sup> *Ibid.*
- <sup>xxxvi</sup> *Ibid.*
- <sup>xxxvii</sup> Kurdistan Regional Government – Executive Order No. 143. January 25, 2009.
- <sup>xxxviii</sup> *Ibid.*
- <sup>xxxix</sup> "Department of Foreign Relations," Kurdistan Regional Government, 7 December 2009. <<http://www.krg.org/articles/detail.asp?lngnr=12&smap=04080000&rnr=267&anr=19906>>.
- <sup>xl</sup> *Ibid.*
- <sup>xli</sup> "How to Contact KRG Representations Worldwide." Kurdistan Regional Government. Updated 29 September 2010, <<http://www.krg.org/articles/detail.asp?rnr=161&lngnr=12&smap=04080100&anr=65>> .
- <sup>xlii</sup> Falah Mustafa Bakir. In discussion with the author. Erbil, Iraq. 16 January 2011.

- xlili *Ibid.*
- xliv Aydin Selçen. In discussion with the author. 11 January 2011.
- xlv Kurdistan Regional Government – Executive Order No. 143. January 25, 2009.
- xlvi “Kurdistan Regional Government Ministers.” Kurdistan Regional Government. Updated 28 October 2009. <<http://www.krg.org/articles/detail.asp?smap=04060000&lngnr=12&rn=159&nr=32148>> .
- xlvii *Ibid.*
- xlviii Tawfiq Rahman Hamad. Email to author. 10 March 2011.
- xlx Falah Mustafa Bakir.
- l i Kurdistan Regional Government – Executive Order No. 143. 25 January 2009.
- li Adbulhakeem Khasro Jawzal. In discussion with the author. 8 January 2011.
- lii Falah Mustafa Bakir.
- liii Qubad Talabani.
- liiv Tawfiq Rahman Hamad.
- lv Othman Ali. In discussion with the author. 8 January 2011.
- lvi *Ibid.*
- lvii Dr. Hussain Taqig Fayzolla. In discussion with the author. 8 January 2011.
- lviii Asow Muhammed. In discussion with the author. 8 January 2011.
- lix Bayan Sami Abdul Rahman. In discussion with the author. 10 January 2011.
- lx *Ibid.*
- lxi *Ibid.*
- lxii Qubad Talabani.
- lxiii Bayan Sami Abdul Rahman.
- lxiv *Ibid.*
- lxv Qubad Talabani.
- lxvi Bayan Sami Abdul Rahman.
- lxvii *Ibid.*
- lxviii *Ibid.*
- lxix Tawfiq Rahman Hamad.
- lxx Falah Mustafa Bakir.
- lxxi Constitution of Iraq, Section Six, Chapter Two, Article 141.
- lxxii Tawfiq Rahman Hamad.
- lxxiii Falah Mustafa Bakir.
- lxxiv Qubad Talabani.
- lxxv Bayan Sami Abdul Rahman.
- lxxvi Lawrence, p. 258.
- lxxvii Qubad Talabani.
- lxxviii Aydin Selçen.