

# Independent Without Independence: The Iraqi-Kurdish Peshmerga in International Law\*

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*The Iraqi-Kurdish Peshmerga has become increasingly important in the coalition fighting the Islamic State of Iraq and Syria ("ISIS"). Despite its prominence, its legal status in international law can seem ill-understood. Conflicting statements from Kurdish and Iraqi officials, in addition to obfuscation and divergent understandings by states supplying the Peshmerga are the norm. In popular discourse the Peshmerga is generally treated as a separate Kurdish armed force, unrelated to Baghdad and the Iraqi armed forces, a position echoed by Kurdish officials. The confusion is compounded by the complexities of the political situation in Iraq, with the Kurdistan Region and its Peshmerga functioning almost entirely independently from the Iraqi federal government.*

*Despite these factual complexities and the apparent divergence in understandings as to the Peshmerga's legal status, this Note argues that the answers provided by international law are quite simple, if politically controversial. As a matter of law, Iraq not only has State responsibility for the Kurdish Peshmerga, but in fact the Peshmerga must be understood to be a part of the Iraqi armed forces under international humanitarian law ("IHL").*

*This conclusion raises tensions and problems, which are explored in this Note. Iraq may have legal responsibility for an armed group (the Peshmerga) which is alleged to have committed significant IHL violations during the conflict against ISIS, and has previously deployed (without Iraq's permission) into Syria. Despite this, Iraq currently has no de facto control over the Peshmerga, nor any ability to prevent or punish illegal actions. Meanwhile, Western nations that directly supply the Peshmerga may be doing so in some cases based on flawed interpretations of the Peshmerga's status under IHL. By arming and training the Peshmerga as a separate entity to the Iraqi armed forces, they ultimately risk harming their own stated policies opposing breaking up Iraq.*

## INTRODUCTION

Questions regarding the legal status of Iraqi-Kurdistan's Peshmerga units are rarely publicly addressed. Having risen to international prominence dur-

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\* This Note was primarily written in the spring of 2017 and was accepted for publication in July 2017. Since then, the Kurdistan Region of Iraq's future has become even more uncertain after the apparent failure of its independence bid. The Peshmerga remains completely independent of the Iraqi armed forces, and the issue of control and independence is likely to remain prominent for the foreseeable future.

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ing the fight against Islamic State of Iraq and Syria (“ISIS”), the Peshmerga are frequently referred to as Kurdistan’s armed forces in popular media, scholarly works, and even in official publications.<sup>1</sup> Though the Kurdistan Region of Iraq (“KRI”) is not an independent state,<sup>2</sup> Kurdish Regional Government (“KRG”) officials often encourage this understanding of the Peshmerga.<sup>3</sup> Since the beginning of Western involvement in the conflict with ISIS, many states have supplied increasing amounts of weaponry and training to the Iraqi-Kurdish Peshmerga, and Kurdish forces have held a key front-line role within the international coalition. In May 2017, the United States, the United Kingdom, and Germany committed to a new multi-year plan to “help the Peshmerga professionalize and reform with the goal of creating a ‘robust and professional’ force capable of defending Iraqi Kurdistan.”<sup>4</sup> The plan is known to contain a provision for the Peshmerga to obtain helicopters and an air wing.<sup>5</sup> While these Western efforts to build up the Peshmerga might not be intended as an exercise in creating a national armed force, many Kurdish officials have linked a strong, modernized Peshmerga with the (Iraqi) Kurdish statehood project.<sup>6</sup> Deepening international involvement with the Peshmerga, despite growing constitutional tensions between components of the Iraqi state, means there is a need for clarity in the international legal discourse surrounding the Peshmerga. Unfortunately, to date such clarity has been lacking.

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1. See, e.g., INSPECTOR GEN., U.S. DEP’T OF DEF., ASSESSMENT OF U.S. AND COALITION EFFORTS TO TRAIN, ADVISE, ASSIST, AND EQUIP THE KURDISH SECURITY FORCES IN IRAQ, REPORT NO. DODIG-2017-033 (Dec. 16, 2016), <http://www.dodig.mil/reports.html/Article/1119338/>; see also Michael Knights, *A Big Win for Kurds at the White House*, AL-JAZEERA (May 15, 2015), <http://www.aljazeera.com/indepth/opinion/2015/05/kurds-obama-barzani-iraq-isil-150512051306148.html>.

2. See, e.g., Michael J. Kelly, *The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause*, 114 PENN ST. L. REV. 707, 710 (2010). The appendix to Kelly’s article contains an English translation of the draft Kurdish Constitution [hereinafter Draft Kurdish Regional Constitution]. For a Kurdish version of the draft Kurdish Constitution see Hemî teksta projeya destûra Kurdistanê [The Full Text of Draft of Constitution of Kurdistan] (Oct. 11, 2006), [http://www.nefel.com/articles/article\\_detail.asp?RubricNr=1&ArticleNr=1506](http://www.nefel.com/articles/article_detail.asp?RubricNr=1&ArticleNr=1506) [hereinafter Draft Kurdish Regional Constitution (original text)].

3. See, e.g., Ministry: *Peshmerga Will Remain under Kurdish Command and Control*, RUDAW (Aug. 19, 2016), <http://www.rudaw.net/english/kurdistan/190820162>.

4. Dalshad Abdullah, *International Coalition Supports Erbil to Unify, Develop Peshmerga*, ASHARQ AL-AWSAT (May 8, 2017), <http://english.aawsat.com/d-abdullah/news-middle-east/international-coalition-supports-erbil-unify-develop-peshmerga>; see also Paul Iddon, *Foreign Advisers Are Turning Kurdish Soldiers into Professionals*, WARISBORING.COM (May 14, 2017), <http://warisboring.com/foreign-advisers-are-turning-kurdish-soldiers-into-professionals/>; *Kurdish Official Reveals Helicopters in Context of 35-Point Plan for Peshmerga*, RUDAW (May 17, 2017), <http://www.rudaw.net/english/kurdistan/170520173>.

5. See, e.g., *id.*

6. See, e.g., Wilson Fache, *Peshmerga Push Towards Mosul with Eyes on a Greater Kurdistan*, MIDDLE EAST EYE (Aug. 17, 2016), <http://www.middleeasteye.net/news/mosul-peshmerga-kurd-iraq-islamic-state-553087723>; see also Masoud Barzani: *Independent Kurdistan is Loyal Response to Peshmerga Sacrifices*, RUDAW (Mar. 5, 2017), <http://www.rudaw.net/english/kurdistan/050320174>.

The autonomy of the KRI's government, legal system, and security forces mean that the KRI often seems to act as a fully independent state.<sup>7</sup> The Peshmerga in particular operates almost entirely independently of the Iraqi government, has deployed abroad,<sup>8</sup> and has been supplied (often directly) by Western governments.<sup>9</sup> Kurdish authorities claim that the Peshmerga is not a part of Iraq's armed forces, while Western states have (by accident or design) largely left questions regarding the Peshmerga's status unanswered.

Yet it is increasingly important to answer these questions. The Peshmerga has been accused of a range of international humanitarian law ("IHL") violations and war crimes in the "disputed territories" of Iraq, necessitating questions regarding Iraq's state responsibility, the Peshmerga's status under IHL, and individual international criminal responsibility acts committed by Kurdish forces.<sup>10</sup> The Peshmerga's status is also relevant for determining the extent to which Iraq has a duty to prevent IHL violations by the Peshmerga. Iraq may even have a duty to take more direct control of Peshmerga operations. With the defeat of ISIS in Iraq, questions related to the conduct of the conflict are likely to rise to prominence. Further, tensions between Iraqi and KRI forces are likely to rise as both Baghdad and Erbil lay claim to the "disputed territories" captured by Kurdish Peshmerga.

This Note aims to outline possible answers to questions that arise from international law relating to the Peshmerga. The Note also attempts to clarify the status of the Peshmerga under IHL, concluding that it must be considered a part of the armed forces of the State of Iraq. The Note will find that despite considerable factual complexities, due to the discrepancy between the de facto and de jure control over the Peshmerga, international law holds comparatively straightforward answers. However, these answers are worth exploring in depth, due to the apparent confusion or unwillingness to accept the Peshmerga as a part of the Iraqi armed forces by many Kurdish officials, some Western states, and in the general public discourse. Thus, Part I of this Note will briefly describe the background, context, and the definition of the Kurdistan Region of Iraq and the Peshmerga. Ongoing disputes between Kurdistan and Iraq regarding the Peshmerga's role and status will be outlined, in addition to divergent international understandings and policies regarding the supplying and training of Kurdish forces. Part II describes the Peshmerga's domestic legal standing under the laws of both Iraq and the KRI, while Part III lays out the international law and

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7. See, e.g., Kelly *supra* note 2, at 733; see also Maher Chmaytelli, *Kurds 'Re-Energize' Independence Referendum Plan for Post-Jihadist Iraq*, REUTERS (Apr. 6, 2017), <http://www.reuters.com/article/us-mideast-crisis-iraq-kurds-idUSKBN17817Q>.

8. See Bram Jansenn & Zeina Karam, *Iraqi Kurdish Lawmakers OK Fighters for Syria*, AP NEWS (Oct. 22, 2014), <https://apnews.com/c0dfddabd9e44eaab8bcbf16289da4cc/syria-claims-it-destroyed-jets-seized>.

9. See *infra* notes 69–75.

10. See generally CRISPIN M.I. SMITH & VARTAN SHADAREVIAN, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, *WILTING IN THE KURDISH SUN: THE HOPES AND FEARS OF RELIGIOUS MINORITIES IN NORTHERN IRAQ* (2017), <http://www.uscifr.gov/sites/default/files/Kurdistan%20report.%20Long.pdf>.

particular IHL provisions pertinent to the status of, and responsibility for, the Peshmerga. Part IV then attempts to answer first whether Iraq has state responsibility for the Peshmerga, despite its *de facto* independence, and then attempts to answer whether or not it is appropriate under IHL to define the Peshmerga as part of the Iraqi armed forces. Finally, Part V considers the tensions that arise as a result of the Peshmerga's legal status in international law.

## I. BACKGROUND, CONTEXT, AND DEVELOPMENTS IN THE PESHMERGA'S LEGAL STATUS

Previously little known beyond experts on Iraq, "Peshmerga"—a Kurdish word applied to a variety of units ranging from local militia to quasi-armed forces—has entered public discourse. In Iraq, the KRI and its semi-autonomous KRG have made use of organized Peshmerga forces to simultaneously push back ISIS while securing considerable territories where control had previously been disputed by the Iraqi federal government in Baghdad. In 2014 the KRI President, Masoud Barzani, dispatched Iraqi-Kurdish Peshmerga units to fight in Syria against ISIS.<sup>11</sup> The effectiveness of the Peshmerga in the fight against ISIS has not been lost on the United States and its allies, with Kurds<sup>12</sup> playing an increasingly prominent role in the coalition fighting ISIS.<sup>13</sup> However, it is important to examine the complex legal and factual relationship between Iraq and the KRI, and the background of the Peshmerga itself, before examining its status under international law and IHL.

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11. See, e.g., Constanze Letsch, *Kurdish Peshmerga Forces Arrive in Kobani to Bolster Fight Against Isis*, GUARDIAN (Nov. 1, 2014), <https://www.theguardian.com/world/2014/nov/01/kurdish-peshmerga-ko-bani-isis-syria>; see also Erika Solomon & Daniel Dombey, *Iraqi Kurd Peshmerga Fighters Enter Kobani*, FIN. TIMES (Oct. 30, 2014), <https://www.ft.com/content/11cf6d3a-602c-11e4-88d1-00144feabdc0>.

12. The Iraqi-Kurdish Peshmerga has played a prominent role providing ground troops in the coalition's fight against Islamic State in Iraq. The role of Syrian Kurdish forces (though entirely separate from Iraqi Kurdish units and command) should also be noted as having played a role in the conflict in both Syria, and in Iraq's Sinjar province. Turkish Kurds ("PKK") have also played a role combatting ISIS, but the international coalition has been less willing to openly work with the PKK. The United States has worked increasingly with the Iraqi-Kurdish Peshmerga, arming, training, and equipping it, as well as supporting ground forces through airstrikes and other combat support.

13. See, e.g., Baxtiyar Goran, *Peshmerga Plays a Very Important Role in Mosul Operation*, KURDISTAN24 (Oct. 20, 2016), <http://www.kurdistan24.net/en/interview/14dc8037-82ee-4ca2-a85f-37c7851a48ff/Peshmerga-plays-a-very-important-role-in-Mosul-operation>.

A. *The Kurdistan Region of Iraq and the Peshmerga: Brief History and Background*

1. *The Kurdistan Region of Iraq and Its Relationship with Iraq*

Though nominally a part of the state of Iraq, the KRI has autonomous status under the Iraqi Constitution.<sup>14</sup> Between 1991 and 2003, the KRI was effectively (but not legally) independent from the rest of Iraq following a United States and United Kingdom led intervention to protect Kurds from Saddam Hussein.<sup>15</sup> After the 2003 U.S.-led invasion of Iraq, the Kurdistan region ratified the Iraqi Federal Constitution, which recognized the KRI as a semi-autonomous region, and recognized the KRG and its post-1992 laws.<sup>16</sup>

Under the Federal Constitution and the Budget Law, Baghdad is required to release seventeen percent of the annual budget to the Kurdistan Region.<sup>17</sup> In recent years, the relationship between the KRG and the federal government in Baghdad has deteriorated following disputes over the status of various territories and cities claimed by both Kurdistan and Iraq,<sup>18</sup> the supply of oil from the KRI to Baghdad,<sup>19</sup> and the apportionment and release of the part of the federal budget set aside for Kurdistan.<sup>20</sup> These disputes, along with gridlock and tension in Kurdistan's internal politics and political system,<sup>21</sup> have led to renewed calls for independence. In April 2017, KRG officials announced that an independence referendum would be called in 2017,<sup>22</sup> and the referendum was scheduled for September 25. In the months before the vote, considerable doubts existed as to whether the referendum would go ahead as significant obstacles existed to realizing actual independence in the near future. These obstacles included vehement opposition to Kurdish independence from surrounding states like Iran and Turkey,<sup>23</sup> opposition and political concerns on the part of western nations like the

14. See Article 117, Section 1, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

15. See Kelly, *supra* note 2, at 719.

16. *Id.* at 732.

17. See WORLD BANK GROUP, *THE KURDISTAN REGION OF IRAQ: ASSESSING THE ECONOMIC AND SOCIAL IMPACT OF THE SYRIAN CONFLICT AND ISIS* 19 (2015).

18. See *Decades-Long Iraqi-Kurdish Alliance 'at Risk of Deterioration'*, NEW ARAB (May 3, 2017), <https://www.alaraby.co.uk/english/indepth/2017/5/3/decades-long-iraqi-kurdish-alliance-at-risk-of-deterioration>.

19. See Denise Natali, *Stalemate, Not Statehood, for Iraqi Kurdistan*, LAWFARE BLOG (Nov. 1, 2015), <https://www.lawfareblog.com/stalemate-not-statehood-iraqi-kurdistan>.

20. See Editorial, *Iraq and the Kurds Are Going Broke*, N.Y. TIMES (Jan. 13, 2016), <https://www.nytimes.com/2016/01/14/opinion/iraq-and-the-kurds-are-going-broke.html>.

21. See, e.g., *One Year Later: Kurdistan Still Locked in Political Gridlock*, RUDAW (June 22, 2016), <http://www.rudaw.net/english/kurdistan/22062016>; see also Crispin M.I. Smith, *Kurdish Referendum: Barzani's Dominance Threatens Future Stability*, MIDDLE EAST INST. (Aug. 22, 2017), <https://www.mei.edu/content/article/kurdish-referendum-barzani-s-dominance-threatens-future-stability>.

22. See, e.g., Chmaytelli, *supra* note 7.

23. See, e.g., *Iran, Turkey Warn Kurdistan Referendum Will Cause 'Conflict' in Iraq*, RUDAW (Aug. 17, 2017), <http://www.rudaw.net/english/middleeast/17082017>.

United States,<sup>24</sup> and KRG officials' failure to have reached an agreement (or even propose a plan) as to how divorce proceedings with Iraq would take place.<sup>25</sup> Despite these doubts, the referendum went ahead with a majority of voters choosing independence. In response to the vote, Iran and Turkey shut down Kurdish airspace and border crossings, and Iraq moved to take control of the disputed territories of Kirkuk and Sinjar.<sup>26</sup> While protesting the moves, Kurdish forces withdrew in a largely peaceful manner.

In spite of ongoing uncertainty as to Kurdistan's status within Iraq,<sup>27</sup> functionally the KRI and KRG still have considerable independence. For example, laws passed by the federal government have little or no effect in the KRI (Kurdish laws are more effectively enforced); Iraqi troops are unable to enter the KRI's official borders without permission; courts function separately from the Iraqi judicial system. Kurdish officials also claim that the portion of the federal budget officially apportioned to the KRI is rarely, if ever, received.<sup>28</sup> Clashes between the Peshmerga and militias supported by

24. See, e.g., Press Release, Brett McGurk, Special Presidential Envoy for the Global Coalition to Counter ISIS, Office of the Special Presidential Envoy for the Global Coalition to Counter ISIS, Update: Global Coalition to Defeat ISIS (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273198.htm> ("Look, we're focused right now on this referendum that Kurdish authorities have said they want to hold on September 25th. It's something the U.S. Government is—firmly, firmly opposes."); see also *On the Timing of the Kurdistan Referendum*, AL RUDAW TV (Aug. 10, 2017), <http://www.peacefare.net/2017/08/10/on-the-timing-of-the-kurdistan-referendum/> (Prof. Daniel Serwer argues the United States will struggle to recognize a unilateral or non-consensual Kurdish declaration of independence due to worries about validating independence movements supported by Russia in Ukraine and the Caucasus.).

25. See, e.g., Omar Sataar, hal al-Akrād jadun fi taḥqīq al-istiqlāl hadha al- 'am (هذا العام هل الأكراد جادون في تحقيق الاستقلال خلال؟) [Are Kurds Serious in Achieving Independence in This Year?], AL-MONITOR (Apr. 10, 2017), <http://www.al-monitor.com/pulse/ar/originals/2017/04/iraq-kurdistan-independence-referendum-iran-turkey.html>.

26. See, e.g., Crispin Smith, *The Kurds Miscalculated with Referendum*, MIDDLE EAST INST. (Oct. 18, 2017), <http://www.mei.edu/content/article/kurds-miscalculated-referendum>.

27. This Note was written in May 2017, before the Kurdish independence referendum (September 2017). The referendum saw a large majority of voters opt for independence despite international and Iraqi objections to the timing of the vote. After the vote, Iraqi forces moved to take control of the "disputed territories," then controlled by Kurdish forces, while authorities in Baghdad rejected the legitimacy of the vote. The Peshmerga largely withdrew peacefully from territories like Sinjar and Kirkuk, though low-level skirmishes occurred in the Nineveh Plains. At the time of the final round of edits, the most likely resolution of events was that the Kurdish independence bid would fail, and the KRI would remain an autonomous region of federal Iraq. In this case, it is likely that the question of the Peshmerga and its status will remain unanswered, as Baghdad attempts to reassert authority while the KRI and KRG attempt to retain autonomy.

28. See Dennis P. Chapman, Security Forces of the Kurdistan Regional Government 256 (Feb. 26, 2009) (Senior Service College Fellowship Project, U.S. Army War College), <http://oai.dtic.mil/oai/oai?verb=getRecord&metadataPrefix=html&identifier=ADA510826>; see also IRAQ LEGAL DEVELOPMENT PROJECT, JUDICIAL REFORM INDEX FOR IRAQ: KURDISTAN SUPPLEMENT 12 (2006), <http://gji.org/wp-content/uploads/2009/01/jri-iraq-kurdistan-2006.pdf>; Kurdistan Regional Government, Official KRG Response to Statements made by Prime Minister of Iraq, Haider al-Abadi (Feb. 15, 2016), <http://cabinet.gov.krd/a/print.aspx?l=12&smap=010000&a=54240>. For examples of Kurdish allegations that portions of the budget are withheld, see Sangar Ali, *Three Months after 2017 Iraqi Budget Approval, Peshmerga Receive No Salary*, KURDISTAN 24 (Mar. 12, 2017), <http://www.kurdistan24.net/en/news/a9169566-455c-4d18-8587-2bac83a5ffdc/Three-months-after-2017-Iraqi-budget-approval--Peshmerga-receive-no-salary>; Isabel Coles, *Baghdad Money Squeeze Tests Limits of Iraqi Kurdistan's Autonomy*, REUTERS (Mar. 17, 2014), <https://uk.reuters.com/article/kurds-iraq/baghdad-money-squeeze-tests-limits-of-iraqi-kurdistans-autonomy-idUKL6NOMC03S20140317>; Geoff Dyer & Shawn Donnan, *Iraqi*

Baghdad were not unknown before the Kurdish referendum in September 2017, and some clashes occurred following Iraq's move to take back control of the disputed territories in October 2017.<sup>29</sup> Thus, the Peshmerga exists in the context of a region that is—though officially part of Iraq—in practice utterly autonomous and often non-compliant with the wishes of the Iraqi federal government.

## 2. *The Peshmerga: Background and Recent History*

“Peshmerga,” a Kurdish word roughly translated as “those who face death,”<sup>30</sup> is generally only applied to Iraqi-Kurdish fighters (as opposed to Syrian or Turkish Kurds).<sup>31</sup> In general, “Peshmerga” may refer to the collection of militias and units that make up the Kurdish forces either as a singular noun (“the Peshmerga”), or an adjective (“Peshmerga forces”). The term can also refer to individual fighters (“a Peshmerga” or “Peshmergas”).

The Peshmerga are divided into two main factions, each linked to one of the main political parties in the KRI. The ruling Kurdistan Democratic Party (“KDP”) and the opposition Patriotic Union of Kurdistan (“PUK”) each have their own recruitment and training processes.<sup>32</sup> In the 1990s—during the period of de facto independence from Saddam Hussein's Iraq—the KDP and PUK fought a civil war against each other.<sup>33</sup> Today the two wings are (to some extent) united under the KRG Ministry of Peshmerga Affairs, a body established under regional law.<sup>34</sup> They are the only domestic military forces operating in Kurdistan,<sup>35</sup> though the KRG and the main political parties also operate internal security, police, and intelligence forces known as the *Asayish* and *Parastin u Zanyari*.<sup>36</sup>

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*Kurds Plead to Allies for Financial Help*, FIN. TIMES (Apr. 14, 2014), <https://www.ft.com/content/784c592e-01d4-11e6-ac98-3c15a1aa2e62>.

29. See, e.g., Mahmut Bozarslan, *Why Tuz Khormato Clashes Were More than Just Local Skirmishes*, AL-MONITOR (May 5, 2016), <http://www.al-monitor.com/pulse/originals/2016/05/turkey-iraq-tuz-khurmatu-new-sunni-shiite-front.html>. In addition, after Iraqi forces moved to reassert Baghdad's authority in disputed territories, almost all alleged clashes between Kurds and Iraqis were between the Peshmerga and *Hashd al-Sha'abi* militias. For more recent reports of the clashes between Iraqi forces and militias and the Peshmerga at Altun Kupri in October 2017, see, for example, *Report: Altun Kupri Town Seized from Kurdish Peshmerga*, AL-JAZEERA (Oct. 21, 2017), <http://www.aljazeera.com/news/2017/10/iraq-army-seizes-town-erbil-fierce-clashes-171020101628079.html>.

30. See, e.g., Brendan Koerner, *Are Kurdish Soldiers “Facing Death” or “Seeking Death”?*, SLATE.COM (Mar. 21, 2003), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2003/03/are\\_kurdish\\_soldiers\\_facing\\_death\\_or\\_seeking\\_death.html](http://www.slate.com/articles/news_and_politics/explainer/2003/03/are_kurdish_soldiers_facing_death_or_seeking_death.html).

31. See Chapman, *supra* note 28, at 38–40.

32. See WLADIMIR VAN WILGENBURG & MARIO FUMERTON, CARNEGIE MIDDLE EAST CTR., KURDISTAN'S POLITICAL ARMIES: THE CHALLENGE OF UNIFYING THE PESHMERGA FORCES 5 (2015), [http://carnegieendowment.org/files/ACMR\\_WilgenburgFumerton\\_Kurdistan\\_English\\_final.pdf](http://carnegieendowment.org/files/ACMR_WilgenburgFumerton_Kurdistan_English_final.pdf); see also Matthew F. Cancian & Kristin Fabbe, *What Iraq's Kurdish Peshmerga Believe*, FOREIGN AFF. (Aug. 25, 2017), <https://www.foreignaffairs.com/articles/middle-east/2017-08-25/what-iraqs-kurdish-peshmerga-believe>.

33. See Chapman, *supra* note 28, at 4.

34. See VAN WILGENBURG & FUMERTON, *supra* note 32, at 1.

35. See, e.g., Matthew Packard, *Earning Independence in Iraqi Kurdistan*, 27 TEMP. INT'L & COMP. L.J. 177, 195 (2013).

36. See Chapman, *supra* note 28, at 2–3.

In 2014, the Iraqi-Kurdish Peshmerga rose to international attention after taking a prominent role in the conflict against ISIS. After the fall of Mosul to jihadists, most Iraqi security forces fled Northern Iraq.<sup>37</sup> With some international support,<sup>38</sup> the Peshmerga engaged with ISIS. At the same time, the Peshmerga moved to occupy certain disputed territories claimed by both Erbil and Baghdad.<sup>39</sup> Notably, the Peshmerga occupied Kirkuk, and a KRG statement declared the contentious question of the governorate's legal status had been "decided on the ground."<sup>40</sup> The Peshmerga also deployed abroad to assist in the fight against ISIS in Syria: in 2014 the KRG parliament and president approved Peshmerga units to travel to assist with the defense of the town of Kobani.<sup>41</sup> In 2016, the KRG and Iraqi federal government announced that the Peshmerga would participate in the Mosul offensive, but would not enter the city proper.<sup>42</sup>

Under Kurdish law and in the KRI's unratified draft constitution, the Peshmerga's commander-in-chief is the KRI president<sup>43</sup> (currently Masoud Barzani). The Peshmerga is considered a regional defensive force under Kurdish law,<sup>44</sup> though the KRI president may dispatch these troops outside of the Region with the approval of Kurdish parliament.<sup>45</sup> Though technically subordinate to the federal government, in practice the KRI president accepts few orders from Baghdad,<sup>46</sup> and while officially the Peshmerga receives part of its budget from federal funds, in practice these funds have rarely been disbursed in recent years.<sup>47</sup>

37. See, e.g., Ned Parker et al., *Special Report: How Mosul Fell - An Iraqi General Disputes Baghdad's Story*, REUTERS (Oct. 14, 2014), <http://www.reuters.com/article/us-mideast-crisis-gharawi-special-report-idUSKCN0I30Z820141014>.

38. See, e.g., Spencer Ackerman, *US to Directly Arm Kurdish Peshmerga Forces in Bid to Thwart Isis Offensive*, GUARDIAN (Aug. 11, 2014), <https://www.theguardian.com/world/2014/aug/11/us-arm-peshmerga-iraq-kurdistan-isis>. After an initial set of defeats and withdrawals at the hands of ISIS, the Peshmerga received arms and training from the United States and other western powers. This was augmented with combat support and airstrikes. *Iraq Crisis: US Strikes Aid Kurdish Bid to Retake Dam*, BBC (Aug. 16, 2014), <http://www.bbc.com/news/world-middle-east-28820509>.

39. See, e.g., Isabel Coles & Stephen Kalin, *In Fight Against Islamic State, Kurds Expand Their Territory*, REUTERS (Oct. 10, 2016), <http://www.reuters.com/investigates/special-report/mideast-crisis-kurds-land/>.

40. See *The Kurds and Iraq: A Winning Hand*, ECONOMIST (July 19, 2014), <http://www.economist.com/news/middle-east-and-africa/21604628-kurds-are-benefiting-mess-iraq-will-independence-follow>; see also Ben Van Heuvelen, *Amid Turmoil, Iraq's Kurdish Region is Laying Foundation for Independent State*, WASH. POST (June 12, 2014), [https://www.washingtonpost.com/world/middle\\_east/amid-turmoil-iraqs-kurdish-region-is-laying-foundation-for-independent-state/2014/06/12/c1f22d7c-f26a-11e3-bf76-447a5df6411f\\_story.html](https://www.washingtonpost.com/world/middle_east/amid-turmoil-iraqs-kurdish-region-is-laying-foundation-for-independent-state/2014/06/12/c1f22d7c-f26a-11e3-bf76-447a5df6411f_story.html).

41. See Jansenn & Karam, *supra* note 8.

42. See, e.g., Video: 'Peshmerga Will Not Enter Mosul,' *Kurdish Iraqi Minister Tells FRANCE 24*, FRANCE 24 (Oct. 7, 2016), <http://www.france24.com/en/20161007-iraqi-kurdish-peshmerga-forces-not-enter-mosul-battle-islamic-state-group>.

43. See Draft Kurdish Regional Constitution, *supra* note 2, art. 99.

44. See *id.*

45. See *id.* art. 104(13).

46. See, e.g., Knights, *supra* note 1.

47. See Kurdistan Regional Government, *supra* note 28; see also INSPECTOR GEN., U.S. DEP'T OF DEF., *supra* note 1, at 3.

Throughout the campaigns against ISIS, accusations of IHL and human rights abuses have been leveled against Kurdish forces. In particular, numerous allegations have been made of forced displacement of non-Kurdish populations in the “occupied” disputed territories,<sup>48</sup> along with destruction of homes and property,<sup>49</sup> the moving-in of Kurdish settlers,<sup>50</sup> arbitrary detentions,<sup>51</sup> killing of protestors,<sup>52</sup> humanitarian blockade,<sup>53</sup> and the killing of ISIS militants taken prisoner.<sup>54</sup> In addition, in 2017 the KRG Ministry of Peshmerga Affairs reiterated that it would not withdraw from the disputed territories<sup>55</sup> despite demands from federal officials in Baghdad.<sup>56</sup> These allegations accelerate the urgency of addressing legal questions as to the Peshmerga’s status.

Aside from the fight against ISIS in Iraq and Syria, the Peshmerga has been involved in low-level conflicts with Turkmen and Shi’a militia in and around Tuz Khurmatu in Salahudin Province. These militias have links both to the Iraqi government and Iran.<sup>57</sup> In addition, low-intensity conflicts have broken out between Peshmerga units in Sinjar and Yezidi militias affiliated with the Turkish-Kurdish PKK. Significant tensions also exist between the Iraqi-Kurdish Peshmerga controlled by the ruling KDP and the Syrian Kurdish militias (known as the YPG) operating in the area.

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48. See, e.g., AMNESTY INT’L, *IRAQ: BANISHED AND DISPOSSESSED: FORCED DISPLACEMENT AND DELIBERATE DESTRUCTION IN NORTHERN IRAQ* 35–38 (Jan. 20, 2016), [https://www.amnestyusa.org/wp-content/uploads/2017/04/banished\\_and\\_dispossessed\\_-\\_forced\\_displacement\\_and\\_deliberate\\_destruction\\_in\\_northern\\_iraq.pdf](https://www.amnestyusa.org/wp-content/uploads/2017/04/banished_and_dispossessed_-_forced_displacement_and_deliberate_destruction_in_northern_iraq.pdf).

49. See, e.g., *Marked With An “X”*: *Iraqi Kurdish Forces’ Destruction of Villages, Homes in Conflict with ISIS*, HUMAN RIGHTS WATCH (Nov. 13, 2016), <https://www.hrw.org/report/2016/11/13/marked-x/iraqi-kurdish-forces-destruction-villages-homes-conflict-isis>.

50. See, e.g., Denise Natali, *Settlers and State Building: The Kirkuk Case*, in *SETTLERS IN CONTESTED LANDS: TERRITORIAL DISPUTES AND ETHNIC CONFLICTS* 114, 133 (Oded Haklai & Neophytos Loizides eds., 2015); see also Coles & Kalin, *supra* note 39.

51. See, e.g., *KRG: Men, Boys Fleeing Fighting Arbitrarily Detained*, HUMAN RIGHTS WATCH (Oct. 27, 2016), <https://www.hrw.org/news/2016/10/27/krq-men-boys-fleeing-fighting-arbitrarily-detained>; see also *Iraq Kurdish Authorities Must End Disgraceful Detention of Yezidi Woman Who Survived IS Captivity*, AMNESTY INT’L (Sept. 9, 2016), <https://www.amnesty.org/en/latest/news/2016/09/iraq-kurdish-authorities-must-end-disgraceful-detention-of-yezidi-woman-who-survived-is-captivity/>.

52. See, e.g., *Iraq/Kurdistan Region of Iraq: Troops Shot at Protesters*, HUMAN RIGHTS WATCH (Mar. 30, 2017), <https://www.hrw.org/news/2017/03/30/iraq/kurdistan-region-iraq-troops-shot-protesters>.

53. See generally CRISPIN M. I. SMITH & VARTAN SHADAREVIAN, *supra* note 10.

54. See, e.g., *IRAQ 2015 HUMAN RIGHTS REPORT*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, *2015 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES* (Apr. 13, 2016), <https://www.state.gov/documents/organization/253137.pdf>.

55. See, e.g., Baxtiyar Goran, *Peshmerga Draw Kurdistan Border with Their Blood*, KURDISTAN 24 (Jan. 4, 2017), <http://www.kurdistan24.net/en/news/0c435694-1656-4d81-9709-0af369dd8d42/-Peshmerga-draw-Kurdistan-border-with-their-blood->

56. See, e.g., Tim Hume & Mohammed Tawfeeq, *Kurds Must Give up Captured Territory Once ISIS Is Defeated, Iraqi Leader Says*, CNN (Nov. 18, 2016), <http://edition.cnn.com/2016/11/18/middleeast/iraqi-kurds-disputed-territory/>.

57. See, e.g., Bozarslan, *supra* note 29; see also Patrick Martin & Christopher Kozak, *The Pitfalls of Relying on Kurdish Forces to Counter ISIS*, INST. FOR THE STUDY OF WAR 4 (Feb. 3, 2016), [http://www.understandingwar.org/sites/default/files/The%20Pitfalls%20of%20Relying%20on%20Kurdish%20Forces%20to%20Counter%20ISIS\\_0.pdf](http://www.understandingwar.org/sites/default/files/The%20Pitfalls%20of%20Relying%20on%20Kurdish%20Forces%20to%20Counter%20ISIS_0.pdf).

### B. Domestic Difficulties Defining the Peshmerga's Legal Status

As a matter of Iraqi law, the Peshmerga's status is unclear. The Iraqi Constitution establishes the Iraqi armed forces and security services, but makes no reference to the Peshmerga.<sup>58</sup> Militias outside the framework of the armed forces are prohibited, but Regions are permitted to raise regional security forces and guards.<sup>59</sup> Iraqi and Kurdish officials have made numerous statements describing the Peshmerga as "part of the Iraqi defense system,"<sup>60</sup> but the meaning of these statements vary between Iraqis and Kurds. In 2015, the Iraqi Prime Minister described the Peshmerga as "an inseparable part of the Iraqi army."<sup>61</sup> Yet the Kurdistan Regional Government and other Kurdish officials draw a greater distinction between the Iraqi army and the Peshmerga, stressing that the force is not trained or equipped by Baghdad, and that Kurdish forces only receive orders from the General Command in Erbil in northern Iraq.<sup>62</sup> Kurdish officials frequently stress that the Iraqi government has not paid for or equipped the Peshmerga despite its position as a component in the Iraqi defense system.<sup>63</sup> Whenever Baghdad withholds Kurdistan's seventeen percent share of the national budget the

58. See Articles 9, 78, 99, 110, 121, Dustūr Jumhūrīyat al-'Irāq [The Constitution of the Republic of Iraq] of 2005 (Iraq).

59. *Id.* art. 121.5.

60. See, e.g., Idris Okuducu, *Peshmerga Forces Don't Get Orders from Iraq Army: KRG*, ANADOLU AGENCY (Aug. 20, 2016), <http://aa.com.tr/en/middle-east/peshmerga-forces-don-t-get-orders-from-iraq-army-kr/632056>; see also Kurdistan Regional Government, Official KRG Response to Statements Made by Prime Minister of Iraq, Haider al-Abadi (Feb. 15, 2016), <http://cabinet.gov.krd/a/print.aspx?l=12&smap=010000&a=54240>; Mewan Dolamari, *Peshmerga under Command of Kurdistan Commander-in-Chief: Peshmerga Ministry*, KURDISTAN 24 (Aug. 20, 2016), <http://www.kurdistan24.net/en/news/24aaccaag-3921-4a5f-a3d1-4e7c14d1c0a5/Peshmerga-under-command-of-Kurdistan-Commander-in-chief--Peshmerga-Ministry>; GÜLISTAN GÜRBAY, SABINE HOFMANN & FERHAD IBRAHIM SEYDER, BETWEEN STATE AND NON-STATE: POLITICS AND SOCIETY IN KURDISTAN-IRAQ AND PALESTINE 37, 186 (2017).

61. See *Iraqi Prime Minister: Peshmerga Part of Iraq's Defense System*, RUDAW (May 6, 2015), <http://www.rudaw.net/english/middleeast/iraq/060520153>.

62. See, e.g., Okuducu, *supra* note 60; see also Kurdistan Regional Government, *supra* note 26; Dolamari, *supra* note 60; GÜRBAY, HOFMANN & SEYDER, *supra* note 60 at 37, 186; Ministry: *Peshmerga Will Remain under Kurdish Command and Control*, *supra* note 3. In 2016, the KRG Ministry of Peshmerga Affairs issued a statement in response to comments made by a U.S. State Department Deputy Spokesman who argued that the Peshmerga "needs to be under the command and control of the Iraqi government." The statement affirmed that the Peshmerga is not under the command or control of the Iraqi government and argued that according to the Iraqi constitution, the Peshmerga is part of Iraq's defense system, but the Iraqi government has not supplied the Peshmerga with weapons or military training and they have not taken any responsibilities towards the Peshmerga. al-Akrād yarfudūn indimām al-Peshmerga ila "al-ḥaras al-watany" (الأكراد يرفضون انضمام البيشمركة إلى «الحرس الوطني») [Kurds Refuse Merging Peshmerga with the "National Guards"], ASH-SHARQ AL-AWSAT (Sept. 12, 2014), <http://aawsat.com/home/article/179766>.

63. See, e.g., GÜRBAY, HOFMANN & SEYDER, *supra* note 60. The quoted interview with Bayan Sami Abdul Rahman mirrors interviews I have conducted both with the High Representative, and other KRG ministers and officials between 2015 and 2016. For an older example, see Abdel Wahab Toomeh, Wazīr "al-Peshmerga": 'adīduha 190 alfan wa laday'ha dabbabāt wa madāfe'i' wa la tas'a ila al-infisāl (البيشمركة، وزير) (ألفاً ولديها دبابات ومدافع ولا تسعى إلى الانفصال 190 عديدها): «البيشمركة» [The Minister of "Peshmerga": Their Number is 190,000, Have Tanks and Cannons, and Does Not Have Intent to Break Away], AL-HAYAT (July 3, 2012), <http://www.alhayat.com/Details/415707>.

KRG quickly becomes unable to pay Peshmerga salaries.<sup>64</sup> However, in late 2016 Erbil received \$8.4 million from the Iraqi federal government to pay Peshmerga salaries,<sup>65</sup> and the federal government passed the National Budget Bill, which guaranteed that the Iraqi government would provide the salaries of 740,000 KRG employees and Peshmerga soldiers.<sup>66</sup> In March 2017 the KRG again claimed the salaries had yet to be paid.<sup>67</sup> It is difficult to ascertain the true nature of the budget vis-à-vis payments to the KRI, though it appears Iraq rarely disburses the allocated funds.<sup>68</sup>

### C. *Western States' Interpretations of the Peshmerga's Legal Status and Relationship with Iraq*

In 2014, several Western governments began supplying arms and ammunition to the KRG to combat ISIS.<sup>69</sup> They were joined by the United States in August 2014, which began providing Peshmerga with arms and equipment directly,<sup>70</sup> followed by various EU and NATO member states.<sup>71</sup> In particular, the United Kingdom, France, and Germany directly supplied the Peshmerga with arms and armaments. More recently, Canada has begun to provide arms direct to the Peshmerga.<sup>72</sup> In May 2017, the United States, the United Kingdom, and Germany committed to a five to ten year plan to “help the Peshmerga professionalize and reform with the goal of creating a ‘robust and professional’ force capable of defending Iraqi Kurdistan.”<sup>73</sup>

Most countries supplying the Peshmerga have made statements reiterating the need for the consent of the state of Iraq, and in many cases arms were initially routed through Baghdad. This was true for arms shipments sup-

64. See, e.g., Daniel Serwer, *Tin Cupping*, PEACEFARE.NET (Apr. 18, 2016), <http://www.peacefare.net/2016/04/18/tin-cupping/>; see also WORLD BANK GROUP, *supra* note 17.

65. See *Erbil Receives \$8.4m from Baghdad for Peshmerga Salaries*, RUDAW (Nov. 5, 2016), <http://www.rudaw.net/english/kurdistan/051120161>.

66. See Baxtiyar Gorran, *Iraqi Parliament Votes on KRG's Share in 2017 Budget Bill*, KURDISTAN 24 (Dec. 4, 2016), <http://www.kurdistan24.net/en/news/a9f020cd-00b9-4ec5-9582-2b9a93f15800>. The budget was heavily criticized by the KRG. See *id.*

67. See Dolamari, *Three Months After 2017 Iraqi Budget Approval, Peshmerga Receive No Salary*, KURDISTAN 24 (Mar. 12, 2017), <http://www.kurdistan24.net/en/economy/a9169566-455c-4d18-8587-2bac83a5ffdc/Three-months-after-2017-Iraqi-budget-approval—Peshmerga-receive-no-salary>.

68. When asked directly what the relationship between Baghdad and the Peshmerga is, KRG officials generally respond by saying that while the Peshmerga is part of the Iraqi “defense system,” it is also fully independent of any command chain or control by Baghdad. When pressed further, this seems to be understood to mean that the KRG expects Baghdad to continue to pay a share of the Peshmerga budget, but is not entitled to exercise any control over the Peshmerga.

69. See Paul Holtom & Christelle Rigual, *After the Arab Spring*, in SMALL ARMS SURVEY 2015: WEAPONS AND THE WORLD 85, 109 (2015).

70. *Id.*

71. See generally JIM ZANOTTI, CONG. RESEARCH SERV., R44513, *KURDS IN IRAQ AND SYRIA: U.S. PARTNERS AGAINST THE ISLAMIC STATE* (2016).

72. See, e.g., Baxtiyar Gorran, *Canada to Deliver Weapons to Peshmerga*, KURDISTAN 24 (Feb. 6, 2017), <http://www.kurdistan24.net/en/news/027c8fed-958a-4504-87b6-b0bb4298ee2f/canada-delivers-arms-supplies-to-peshmerga->

73. See, e.g., Iddon, *supra* note 4.

plied by the United States,<sup>74</sup> the United Kingdom, France,<sup>75</sup> and Canada, (along with the EU council of foreign ministers). However, many countries—including Germany and the United States—now ship arms directly to Erbil.

By requiring Baghdad's consent, it appears that these western nations—at least implicitly—accept that the Peshmerga is subordinate to the state of Iraq. However, none of these states have issued clear statements regarding the legal status of the Peshmerga and its relationship with the state of Iraq. This approach, and the broader policies related to supplying the Peshmerga, has been criticized from the start. In 2014, a report by International Crisis Group stated that:

Coalition members see arming the Kurds as a quick security fix, divorced from broader political considerations. They have approached it as a technical question, with their defence ministries and military attache's taking the lead in what appears a mere logistical task. Arms have been delivered with no particular strings attached: neither end-use conditions nor follow-up. For example, the coalition has been hands-off on the peshmerga chain of command and strategy—who reports to whom, who gives orders and to what end; and who receives the weapons, to whom they are given and against whom and how they are used.<sup>76</sup>

Meanwhile, though many coalition weapons shipments to the Kurds are “funnelled through Baghdad, [Iraqi Prime Minister] Abadi, and the Iraqi state, [Iraq still has] no control over Peshmerga forces on the ground.”<sup>77</sup> Current coalition policy “provides Western countries with a nominal legal framework for sending weapons to Iraqi Kurdistan, discharging them of the responsibility to follow up [on] what the end-users actually do with these weapons on the ground.”<sup>78</sup> The rest of this section briefly examines specific policy of three major states supplying the Peshmerga, focusing on their respective understandings of the Peshmerga's status and relationship with Iraq. Though not the only states supplying the Peshmerga, the United States, the United Kingdom, and Germany have been major supporters and suppliers of Kurdish forces from the earliest phases of the conflict against ISIS in 2014. All three have grappled with the legality of supplying arms to

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74. See, e.g., Bryant Jordan, *House Weighs Directly Arming Kurds in Northern Iraq, Skirting Baghdad*, MILITARY.COM (Dec. 8, 2015), <http://www.military.com/daily-news/2015/12/08/house-weighs-arming-kurds-northern-iraq-skirting-baghdad.html>.

75. See, e.g., *France to Send Arms to Iraqi Kurds*, AL-JAZEERA (Aug. 13, 2014), <http://www.aljazeera.com/news/middleeast/2014/08/france-supply-weapons-iraqi-kurdistan-2014813143856260983.html>.

76. INT'L CRISIS GRP., *ARMING IRAQ'S KURDS: FIGHTING IS, INVITING CONFLICT MIDDLE EAST REPORT N°158 20* (2015).

77. Sara Elizabeth Williams, *Destroying Homes for Kurdistan*, FOREIGN POL'Y (July 23, 2015), <http://foreignpolicy.com/2015/07/23/peshmerga-war-crimes-ethnic-cleansing-islamic-state-iraq/>.

78. *Id.* (quoting Maria Fantappie, senior Iraq analyst at the International Crisis Group).

groups in Iraq, and so have also attempted to understand the Peshmerga's status.

1. *United States Policy Regarding the Peshmerga Remains Ambiguous*

U.S. Public Laws 113-23512 (2015) and 113-291 (2015) authorized the Secretary of Defense, in coordination with the Secretary of State, "to provide assistance, including training, equipment . . . to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces, with a national security mission, through December 31, 2016."<sup>79</sup> This suggests that the United States considers the Peshmerga to either be "part of" the Iraqi armed forces, or "associated with" them. Yet it remains unclear which of these two interpretations is the case.

In December 2016, a Department of Defense report described the Peshmerga as the "military force of Iraqi Kurdistan."<sup>80</sup> A December 2016 Congressional Research Service report summarized the U.S. approach to the Peshmerga as follows: "[a]t present, U.S. assistance to security forces in Iraq, including to Kurdish and other regional or local forces, is coordinated with and/or channeled through the Iraqi national government."<sup>81</sup> The report goes on to explain this approach as "reflective of an overall U.S. legal and policy approach that identifies countries (i.e., national governments) and international organizations as the specified lawful recipients of U.S. security assistance."<sup>82</sup> The specific status of the Peshmerga goes unaddressed.

However, there is an ongoing push from some U.S. policymakers to directly supply and fund the Peshmerga, bypassing Iraq entirely.<sup>83</sup> For example, House Resolution 1654 "[t]o authorize the direct provision of defense articles, defense services, and related training to the Kurdistan Regional Government, and for other purposes," introduced in March 2015, would not have required the United States to obtain consent from the Government of Iraq, instead only requiring the U.S. President to "consult" with Iraq.<sup>84</sup> Nevertheless, the same Bill notes that the Peshmerga are a "component" of the Iraqi Security Forces.<sup>85</sup>

Further confounding an understanding of a U.S. definition of the Peshmerga, in July 2016, the United States signed a memorandum of un-

79. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292 (2014) (emphasis added).

80. See INSPECTOR GEN., *supra* note 1, at 4.

81. Zanotti, *supra* note 71, at 7.

82. *Id.*

83. See, e.g., Laurie Mylroie, *Senator Marco Rubio: Open to Direct Arms Sales to KRG*, KURDISTAN 24 (May 2, 2017), <http://www.kurdistan24.net/en/news/5c6bf5d1-dfae-4ada-90fa-1a0a531d1fc4/Senator-Marco-Rubio-Open-to-direct-arms-sales-to-KRG>.

84. H.R. 1654, 114th Cong. § 4(a) (2015) ("To authorize the direct provision of defense articles, defense services, and related training to the Kurdistan Regional Government, and for other purposes.").

85. *Id.* § 2(2).

derstanding with the KRG in Erbil, pledging \$415 million for Peshmerga salaries, ammunition, and supplies.<sup>86</sup> The agreement was signed by Karim Sinjari, the acting Minister of Peshmerga Affairs, and Elissa Slotkin, the acting U.S. Assistant Secretary of Defense for International Security Affairs.<sup>87</sup> The exact terms were not made public, and it was speculated that the United States had bypassed Baghdad. A week later, the Iraqi Defense Ministry issued a statement regarding the memorandum, stressing it was not a treaty and stating that Iraq had agreed to it.<sup>88</sup> The statement did not clarify whether Iraq had had any role in the agreement.<sup>89</sup> In a separate agreement in 2017 the United States approved the sale of \$295.6 million in equipment and arms, at the request of the Government of Iraq to “fully outfit two full Peshmerga Regional Brigades of light infantry . . . .”<sup>90</sup> The press release from the Defense Security Cooperation Agency noted that “Iraq will have no difficulty absorbing this equipment into its *armed forces*,”<sup>91</sup> suggesting an understanding of the Peshmerga as a part of the Iraqi armed forces.

2. *The United Kingdom Clearly and Openly Considers the Peshmerga to Be a Legal Entity of the Iraqi State*

A U.K. parliamentary briefing paper stated that “[t]he UK Government can probably argue with confidence that it would be legal to supply arms direct to the Kurdish Regional Government.”<sup>92</sup> The briefing paper added that:

since [the Peshmerga] can be considered a legal entity under the Iraqi Constitution, [it] cannot be viewed as a ‘non-state actor’ under international law. In any case, the UK does not consider . . . that there is a general prohibition under international law against supplying arms to non-state actors.<sup>93</sup>

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86. See *US Conditions Military Aid to Peshmerga on Cooperation with Baghdad*, 1001 IRAQI THOUGHTS (July 29, 2016), <http://1001iraqithoughts.com/2016/07/29/us-conditions-military-aid-to-peshmerga-on-cooperation-with-baghdad/>; see also Press Release, KRG Cabinet, Kurdistan Region and the US Sign a Military Agreement (July 13, 2016), <http://cabinet.gov.krd/a/d.aspx?s=010000&l=12&a=54717>; Holtom & Rigual, *supra* note 69.

87. See Press Release, KRG Cabinet, *supra* note 86.

88. See Statement, Iraqi Ministry of Defence, Tawdīḥ (توضیح) [Clarification] (July 22, 2016), <https://www.mod.mil.iq/index.php?name=news&file=article&sid=3470>.

89. *Id.* (emphasis added).

90. See Press Release, Defense Security Cooperation Agency, Government of Iraq – Equipment for Two Peshmerga Infantry Brigades and Two Support Artillery Battalions (Apr. 19, 2017), [http://www.dsca.mil/sites/default/files/mas/iraq\\_17-10.pdf](http://www.dsca.mil/sites/default/files/mas/iraq_17-10.pdf).

91. *Id.* (emphasis added).

92. BEN SMITH ET AL., U.K. HOUSE OF COMMONS LIBRARY, BRIEFING PAPER SN06963, UK ARMS TRANSFERS TO THE PESHMERGA IN IRAQI KURDISTAN 2 (Aug. 18, 2014), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN06963>.

93. *Id.*

As early as 2014, the United Kingdom was flying arms directly to Erbil, and had provided the KRG with weapons in the form of “gifts,”<sup>94</sup> which allowed the U.K. Government to claim “Crown Immunity from the 2002 Export Control Act.”<sup>95</sup> Also in 2014, then British Foreign Secretary Phillip Hammond stated with regard to supplying the Peshmerga that:

[t]he sovereign entity with which [the UK] deal[s] is Iraq, and it is clear that any activity, whether it is the supply of weapons and equipment . . . would always have to be something that was done at the request of the government of Iraq and with the full agreement of the government of Iraq . . . . [I]t would have to be endorsed by Baghdad. That is the legally responsible entity.<sup>96</sup>

A May 2017 House of Lords report reiterated “[t]he UK calibrates its engagement with the Iraqi Kurds via the central government in Baghdad.”<sup>97</sup> Thus the United Kingdom’s position is clearer than that of the United States, insofar as the United Kingdom clearly and openly considers the Peshmerga to be a legal entity of the Iraqi state, with Iraq having ultimate legal responsibility for the forces.

### 3. *Germany Viewed the Peshmerga as More Distinct from the Iraqi State*

Some countries appear to supply the Peshmerga without going via Baghdad. Germany in particular has routed its arms directly to Erbil.<sup>98</sup> Starting in 2014, Germany stationed Bundeswehr soldiers in Erbil to receive and distribute arms directly to the Peshmerga, bypassing Baghdad completely. In addition, Germany trains Peshmerga fighters both in the KRI and in Germany. According to one KRG official, “Most of the weapons and military vehicles recently supplied to Iraq’s Kurdish Regional Government (KRG)’s Peshmerga forces have come from Germany.”<sup>99</sup> For its first shipments, Germany did not ask Baghdad for permission.<sup>100</sup> More recent releases

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94. *UK Gifts Arms and Ammunition to Kurdish Regional Government*, UK MINISTRY OF DEFENSE (Sept. 24, 2014), <https://www.gov.uk/government/news/uk-gifts-arms-and-ammunition-to-kurdish-regional-government>.

95. SMITH ET AL., *supra* note 92, at 2.

96. FOREIGN AFF. COMM., ORAL EVIDENCE: DEVELOPMENTS IN UK FOREIGN POLICY, 2014, HC 606, at 2–3, <https://www.parliament.uk/documents/commons-committees/foreign-affairs/DEV0E0001.pdf>.

97. SELECT COMM. ON INT’L RELATIONS, THE MIDDLE EAST: TIME FOR NEW REALISM, 2016–17, HL 159, ¶ 303 (U.K.), [https://www.publications.parliament.uk/pa/ld201617/ldselect/ldintrel/159/15910.htm#\\_id=TextAnchor135](https://www.publications.parliament.uk/pa/ld201617/ldselect/ldintrel/159/15910.htm#_id=TextAnchor135).

98. *See More French Arms for Peshmerga in June, Minister Promises in Erbil*, RUDAW (Apr. 12, 2016), <http://www.rudaw.net/english/kurdistan/120420162>; *Germany Affirms Peshmerga Support in Lead Up to Mosul Offensive*, RUDAW (Sept. 24, 2016), <http://www.rudaw.net/english/kurdistan/24092016>.

99. *See* Editorial, *Germany Is Iraqi Kurdistan’s Top Arms Supplier: Official*, EKURD (Jan. 25, 2016), <http://ekurd.net/germany-kurdistan-top-arms-supplier-2016-01-25>.

100. *See* INT’L CRISIS GRP., *supra* note 76, at 17 n.69.

suggest that the Iraqi government agreed to the supply.<sup>101</sup> On May 4, 2017, news sources reported that Germany had stopped supplying arms to the Peshmerga.<sup>102</sup>

Germany appears to view the Peshmerga as distinct from the Iraqi armed forces.<sup>103</sup> Some statements and press releases refer to the Peshmerga and the Iraqi armed forces as separate entities, both to be supplied.<sup>104</sup> Many German government press releases concerning the supplying and training of the Peshmerga make no mention of the Government of Iraq, or Iraq's armed forces.<sup>105</sup>

#### 4. *A Range of Interpretations Creates Confusion as to the Status of the Peshmerga*

It is clear that there is a range of positions on the legal status of the Peshmerga vis-a-vis its relationship with the state of Iraq. These range from views holding that the Peshmerga is part of the Iraqi armed forces, to a less clear view of the Peshmerga as a "component" of the Iraqi "security system." Still other countries suggest through their actions a view of the Peshmerga as an entity completely separate from the Iraqi state. Such variation, combined with a lack of clarity on states' official understandings of the Peshmerga, and an even greater range of understanding in popular discourse, opens the door to conflicting interpretations of how states and other international entities should understand and act with regard to the Peshmerga. It also may contribute to incorrect understandings within the KRI and Iraq of

101. See, e.g., *Unterstützung der Regierung der Autonomen Region Irakisch-Kurdistan bei der Versorgung der Flüchtlinge und beim Kampf gegen den Islamischen Staat im Nordirak* [Assisting the Government of the Iraqi Kurdistan Autonomous Region in the Care of Refugees and in the Fight Against the Islamic State in Northern Iraq], BUNDESMINISTERIUM DER VERTEIDIGUNG (Aug. 31, 2014), <http://www.hardthoehen.kurier.de/index.php/news/1241-unterstuetzung-der-regierung-der-autonomen-region-irakisch-kurdistan-bei-der-versorgung-der-fluechtlige-und-beim-kampf-gegen-den-islamischen-staat-im-nordirak>.

102. See, e.g., *German Army to Continue Supporting Kurdish Peshmerga, but Won't Send New Weapons: Official*, ARA NEWS (May 4, 2017), <http://aranews.net/2017/05/german-army-to-continue-supporting-kurdish-peshmerga-but-wont-send-new-weapons-official/>.

103. See, e.g., *Bundeswehr to Continue Training the Peshmerga*, GERMAN FEDERAL GOVERNMENT (Jan. 26, 2017), [https://www.bundesregierung.de/Content/EN/Artikel/2017/01\\_en/2017-01-11-mandat-irak\\_en.html](https://www.bundesregierung.de/Content/EN/Artikel/2017/01_en/2017-01-11-mandat-irak_en.html) ("The Bundeswehr mission aims to improve the capabilities of the Iraqi armed forces and the Peshmerga. Since 2015 the Bundeswehr and its international partners have already trained more than 12,000 members of the security forces in northern Iraq.").

104. See, e.g., *Der Einsatz im Irak* [The Mission in Iraq], BUNDESWEHR (Feb. 15, 2017), [http://www.einsatz.bundeswehr.de/portal/a/einsatzbw/start/aktuelle\\_einsaetze/irak/hintergrund!/ut/p/z/1/04\\_Sj9CPkyssy0xPLMnMz0vMAfJjo8zinSx8QnyMLI2MXNzNjQ0cAy2CHc1cJA0MLA30wwkpiAJKG-AAjgb6wSmp-pFAM8xxm2GqH6wfpR-ViVWwKfXkF9UkpNaopeYDHKhfmRGY15KmpAfrIjRKAgN6LcoNxrEQB2FqPX/dz/d5/L2dBISeVz0FBIS9nQSEh/#Z7\\_B8LTL2922DG730AQ8SA6D30095](http://www.einsatz.bundeswehr.de/portal/a/einsatzbw/start/aktuelle_einsaetze/irak/hintergrund!/ut/p/z/1/04_Sj9CPkyssy0xPLMnMz0vMAfJjo8zinSx8QnyMLI2MXNzNjQ0cAy2CHc1cJA0MLA30wwkpiAJKG-AAjgb6wSmp-pFAM8xxm2GqH6wfpR-ViVWwKfXkF9UkpNaopeYDHKhfmRGY15KmpAfrIjRKAgN6LcoNxrEQB2FqPX/dz/d5/L2dBISeVz0FBIS9nQSEh/#Z7_B8LTL2922DG730AQ8SA6D30095).

105. See, e.g., *Ein Peshmerga-Kommandeur am Kartentisch* [A Peshmerga Commander at the Card Table], BUNDESWEHR (May 8, 2017), [http://www.einsatz.bundeswehr.de/portal/a/einsatzbw/start/aktuelle\\_einsaetze!/ut/p/z/1/hY\\_LD0IwEEX\\_jCkoD5fFKiFBNIKPdmMaaBCDLWkqceHHW2J0R5zFTebemTMZYHAGJvnQNty0sVLo9pQflZjKysxBe4pDxilKx9tiyWZJSIEI5z-jTAb04nCCiPaALWMCjKRuFAAA1YLp1JSmFGNkKa12mhulHZ6pU03Jg-tbeKONVDkktgN599T7gtvpgjhpMPJJGu9H4I0P\\_Pnb5dX4NNAr13UundqrCH60\\_r6M895s3WET20A!!/dz/d5/L2dBISeVz0FBIS9nQSEh/#Z7\\_B8LTL2922DTUA0IE500SCD3GG1](http://www.einsatz.bundeswehr.de/portal/a/einsatzbw/start/aktuelle_einsaetze!/ut/p/z/1/hY_LD0IwEEX_jCkoD5fFKiFBNIKPdmMaaBCDLWkqceHHW2J0R5zFTebemTMZYHAGJvnQNty0sVLo9pQflZjKysxBe4pDxilKx9tiyWZJSIEI5z-jTAb04nCCiPaALWMCjKRuFAAA1YLp1JSmFGNkKa12mhulHZ6pU03Jg-tbeKONVDkktgN599T7gtvpgjhpMPJJGu9H4I0P_Pnb5dX4NNAr13UundqrCH60_r6M895s3WET20A!!/dz/d5/L2dBISeVz0FBIS9nQSEh/#Z7_B8LTL2922DTUA0IE500SCD3GG1).

the Peshmerga's legal status. As will be discussed in Section VI, this entrenches a sense of complexity in the law. Though perhaps considered politically useful by some actors, this complexity is in fact legally unnecessary. Moreover, unneeded complexity makes a resolution to potential IHL violations more difficult, and may ultimately risk contributing to the breakup of Iraq (counter to current western policy).

*D. The Problems Arising from Difficulties in Defining the Peshmerga's Legal Status*

Should the KRI become independent, the Peshmerga would surely become the new state's armed forces. However, for the time being the Peshmerga's status is ambiguous, as are efforts to attribute violations and abuses of international law in the various conflicts the Peshmerga is fighting.

The status of the Iraqi-Kurdish Peshmerga presents a number of problems for IHL. As discussed above, under KRI laws the Peshmerga is considered a regional defensive force,<sup>106</sup> though the KRI president may dispatch them outside of the Region with Kurdish parliamentary approval.<sup>107</sup> Under federal Iraqi law the Peshmerga's status is less clear, but it is often accepted by foreign governments that the Peshmerga is a legal entity under Article 121(5) of the 2005 Iraqi Constitution.<sup>108</sup> In public statements, KRG officials stress the Peshmerga is not under the command of Baghdad, while simultaneously claiming that the Peshmerga is part of the defense structures of the state.<sup>109</sup> Iraqi officials sometimes claim that the Peshmerga is a part of the army.<sup>110</sup> The Iraqi Security Forces and the Peshmerga have successfully worked closely together in the fight against ISIS. However, at times the Peshmerga clearly has acted without the permission of Baghdad, or even directly counter to the wishes of the federal government. In the disputed areas especially, there is now little evidence of cooperation between Iraqi forces and the Peshmerga.<sup>111</sup>

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106. See Draft Kurdish Regional Constitution, *supra* note 2, art. 104(13).

107. See *id.*

108. See SMITH ET AL., *supra* note 92, at 1.

109. See, e.g., Idris Okuducu, *Peshmerga Forces Don't Get Orders from Iraq Army: KRG*, ANADOLU AGENCY (Aug. 20, 2016), <http://aa.com.tr/en/middle-east/peshmerga-forces-don-t-get-orders-from-iraq-army-kr/632056>; see also Kurdistan Regional Government, Official KRG Response to Statements made by Prime Minister of Iraq, Haider al-Abadi (Feb. 15, 2016), <http://cabinet.gov.krd/a/print.aspx?l=12&smap=010000&a=54240>; Sangar Ali, *Peshmerga Under Command of Kurdistan Commander-in-chief: Peshmerga Ministry*, KURDISTAN24 (Aug. 20, 2016), <http://www.kurdistan24.net/en/news/24aacca-3921-4a5f-a3d1-4e7c14d1c0a5/Peshmerga-under-command-of-Kurdistan-Commander-in-chief—Peshmerga-Ministry>; GÜRBAY, HOFMANN & SEYDER, *supra* note 60, at 186 (2016).

110. See *Iraqi Prime Minister: Peshmerga part of Iraq's defense system*, RUDAW (May 6, 2015) <http://www.rudaw.net/english/middleeast/iraq/060520153>.

111. See, e.g., 'Historic Cooperation' of Kurdish, Iraqi Forces Not Evident in 'Disputed Areas', RUDAW, (Jan. 1, 2017), <http://www.rudaw.net/english/kurdistan/010120172>; see also Okuducu, *supra* note 60.

The lack of cooperation raises the question of whether or not the Peshmerga are members of Iraq's armed forces as a matter of IHL, with command responsibility ultimately resting in Baghdad, or whether they are better understood as an organized armed group unaffiliated with any state. It also raises questions regarding responsibility for any illegal actions committed by the Peshmerga: as an armed group in the state of Iraq, it may be that Iraq has state responsibility—though the lack of actual control by the Government of Iraq may have an impact on questions related to responsibility for IHL violations. Thus, determining the status of the Iraqi-Kurdish Peshmerga, and the nature of its relationship with Iraq, has implications for questions related to accountability for crimes committed.

## II. DOMESTIC LAW

To answer questions pertaining to international law and IHL it is important to understand the domestic legal provisions that pertain to the Peshmerga. This is relevant not only to clarify the domestic law, but also because domestic law may be considered both when ascertaining whether the Peshmerga is an organ of the Iraqi state based on the law of state responsibility, and when considering whether there is a “command responsible” relationship between Iraq and the Peshmerga under IHL's Additional Protocol I Article 43.<sup>112</sup> Due to the KRI's near complete autonomy, it is necessary to consider both Iraqi federal law and Kurdish regional law.

### A. *Iraqi Federal Law*

As Kurdistan is legally a part of the federal state of Iraq, it is governed (at least technically) by Iraq's Constitution. The Constitution provides some information regarding the make-up of Iraq's armed forces. Article 9 of the Iraqi Constitution establishes the Iraqi armed forces and security services.<sup>113</sup> Under Article 9(1)(a), the armed forces are “subject to the control of the civilian authority, [and] shall defend Iraq[.]”<sup>114</sup> In addition, under Article 9(1)(b) “[t]he formation of military militias outside the framework of the armed forces is prohibited.”<sup>115</sup> This immediately provides a set of paradoxes regarding the Peshmerga. It is not under the control of Iraq's civilian authority and further, by moving to take disputed areas like Kirkuk against the wishes of Baghdad, it is hard to argue it is defending Iraq. Moreover, the units operate outside of the framework of the Iraqi armed forces. All this could suggest the Peshmerga is in fact a prohibited militia.

112. See *infra* Section IV.B.

113. Article 9, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

114. *Id.*

115. *Id.*

However, the Peshmerga as a legal entity under domestic law may be established by the federal constitution's Article 121(5), which holds the "[t]he regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region."<sup>116</sup>

The Iraqi Parliament has also acknowledged the Peshmerga. The 2007 and 2008 Iraqi Budget Framework Laws provided that the Prime Minister of Iraq and the Prime Minister of the Kurdistan Region would agree on expenditures for arming and equipping the Regional Guards (the Peshmerga) and incorporating them into the national defense system of Iraq.<sup>117</sup> In December 2016, the Iraqi budget included a provision for the funding of Kurdish Peshmerga forces (though the KRG claimed the funds were not disbursed).<sup>118</sup> This implies that the Parliament at least did not consider the Peshmerga to be an illegal militia, in turn suggesting that the Iraqi Parliament considered the Peshmerga to be a part of the Iraqi armed forces and security services.

### B. *Kurdistan Regional Law*

The KRI is a semi-autonomous region, permitted under the Iraqi federal system.<sup>119</sup> The KRI has its own parliament, which has passed laws since 1992. Kurdish laws passed between 1992 to the present are also recognized under Iraqi law and remain in force within the KRI.<sup>120</sup> Iraqi law and the Iraqi constitution are generally ignored, with the Kurdish courts functioning separately. As Kurdistan's separate laws are recognized under Iraq's constitution, they should be considered part of the domestic law of Iraq.

Law Number (2) of 1992 sought to render the Peshmerga "legally accountable to the governing institutions then under construction in the Kurdish region."<sup>121</sup> The Ministry of Peshmerga Affairs was established later that year by the Kurdistan National Assembly (now the Kurdish Parliament) in Law Number (5).<sup>122</sup> Since the ratification of the Iraqi federal con-

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116. Article 121, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005.

117. See Chapman, *supra* note 28, at 102.

118. See Gorran, *supra* note 66. For examples of Kurdish allegations that portions of the budget are withheld, see, e.g., Ali, *supra* note 28; Coles, *supra* note 28; Dyer & Donnay, *supra* note 28. The author has also heard the claim directly from KRG ministers and officials.

119. Articles 116–17, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005. For a discussion of Kurdish autonomy, see generally Kelly, *supra* note 2.

120. Article 141, *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005 ("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 the Constitution.").

121. See Chapman, *supra* note 28, at 98–99.

122. See The Law of the Ministry of Peshmerga Affairs No. 5 of 1992 (Kurdistan Parliament), <http://perleman.org/files/articles/010315081250.pdf>.

stitution, the Kurdish parliament has passed a series of laws related to the regulation of the Peshmerga.<sup>123</sup>

The KRG has also drawn up a constitution as permitted by federal law.<sup>124</sup> To date, this constitution remains in draft form, and has not been ratified due to political gridlock in Kurdish politics. Nevertheless, the draft constitution is of considerable importance within KRI law and politics. Various references to the Peshmerga appear in the draft,<sup>125</sup> and the term “Peshmerga” is frequently qualified in the Kurdish text as a “Regional Defense Force.”<sup>126</sup> Article 13 provides that “the Kurdistan Region has a Peshmerga Defensive Force to protect the Region and its structure, duties, and works. The force is organized by law. Armed militias may not be formed outside of the basis of law.”<sup>127</sup> Article 99 establishes the President of the Kurdistan Region as the “General Leader of the Peshmerga,”<sup>128</sup> while Article 104(13) provides that “[t]he Region’s President is entitled to dispatch Peshmerga Forces (Regional Guard) outside the Internal Security Forces to beyond the Region’s borders with the approval of the Parliament of Kurdistan Region of Iraq.”<sup>129</sup> Lastly, Article 123 would establish a system of military courts or tribunals for addressing crimes committed by the Peshmerga or Internal Security Forces.<sup>130</sup>

The provisions of Article 104(12) are also of interest:

The President of the Region shall have the following powers: . . .

(12): With the approval of the Iraqi Kurdistan Parliament [the President may] permit [Iraqi] Federal Armed Forces or any other military units to enter the Region when necessary, so long as they

123. See Chapman, *supra* note 28, at 100. These laws include: Law of the Peshmerga Ministry in Kurdistan Region-Iraq Law No. 19 of 2007 (Iraq) (enumerating the organization and responsibilities of the Peshmerga Ministry); Law of Recognition of Peshmerga (The Guards of the Kurdistan Region-Iraq) No. 33 of 2007 (The Guards of the Kurdistan Region-Iraq) (defining who is entitled to be called a Peshmerga, defining the computation of service time in the Peshmerga for purposes of promotion and advancement, and empowering the Peshmerga Minister to promulgate instructions for extending special recognition to Peshmerga members and veterans); Law of Retirement of Disabled Peshmerga (The Guards of the Kurdistan Region-Iraq) No. 34 of 2007 (defining conditions for retirement of Peshmerga, as well as compensation and benefits due to the families of martyred Peshmerga); Law of Service and Retirement of Peshmerga (The Guards of the Region) No. 38 of 2007 (governing the hiring, service, and retirement of Peshmerga, including specifying the required qualifications for enlistment and promotions; and crediting for service with organizations outside the Peshmerga (presumably referring to security services of the Iraqi Government and other non-Peshmerga services within the KRG)).

124. See Article 120, *Dustūr Jumhūriyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005.

125. See generally Draft Kurdish Regional Constitution, *supra* note 2.

126. See, e.g., *id.* art. 13 *Herēna Kurdistanē hēzēn berevanikirinē yēn pēşmergeyî* [The Region of Kurdistan Defense Forces Under the Peshmerga]; see also, art. 99(1) *pēşmergeyan (parēzvanēn herēmē)* [Peshmerga (Defenders of the Region)]; art. 104(12), *hēzēn pēşmergeyan (parēzvanēn herēmē) yan hēzēn asayişa navxwe bişîme* [Peshmerga Forces (Defenders of the Region) or to Send the Security Forces to Them].

127. See Draft Kurdish Regional Constitution, *supra* note 2, art. 13.

128. *Id.* art. 99.

129. *Id.* art. 104(13).

130. *Id.* art. 123.

specify their mission, and the place, time, and duration of their presence.<sup>131</sup>

It is unclear whether this provision should be understood to mean that under regional law, the armed forces of Iraq's federal government (or foreign armed forces) may *only* operate within the region with the permission of the Kurdish President and the approval of the Kurdish Parliament. Such an interpretation would be consistent with current KRG practice.

### III. INTERNATIONAL LAW AND INTERNATIONAL HUMANITARIAN LAW

This Note considers both international law of state responsibility, and international humanitarian law, in order to understand the Peshmerga and its legal status. The most relevant sources of law are the Draft Articles on State Responsibility, the Third Geneva Convention, the First Additional Protocol to the Geneva Conventions, and the Hague Regulations.

#### A. *International Law (Law of State Responsibility)*

For determining the relationship of the Peshmerga and Iraq, Article 4 of the Draft Articles on State Responsibility is relevant, holding:

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status *in accordance with the internal law of the State*.<sup>132</sup>

#### B. *International Humanitarian Law (Defining "Armed Forces")*

Iraq has ratified the First Additional Protocol ("Additional Protocol I") to the Geneva Conventions. Under Additional Protocol I, armed forces are defined in Article 43(1) as follows.

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject

131. *Id.* art. 104(12).

132. See Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 4, *in* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, 44 U.N. Doc. A/56/10, at 43, 44 (2001) [hereinafter Draft Articles on State Responsibility] (emphasis added).

to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.<sup>133</sup>

The International Committee of the Red Cross (“ICRC”) considers the definition of armed forces laid out in Additional Protocol I section 43(1) to be customary, adding that for “purposes of the principle of distinction, it may also apply to State armed forces in non-international armed conflict.”<sup>134</sup> In addition, section 43(3) holds that “[w]henever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.”<sup>135</sup>

The Additional Protocol I section 43(1) definition is built on older definitions in the Hague Regulations and the Third Geneva Convention.<sup>136</sup> Article 1 of the Hague Regulations is particularly instructive, holding that:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”<sup>137</sup>

Article 4 of the Third Geneva Convention uses the same definition for the purposes of determining individuals eligible for prisoner of war status.<sup>138</sup> However, the ICRC argues that “the definition in Article 43 of Additional Protocol I is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and

133. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 43(1), June 8, 1977, 1125 U.N.T.S. 3, [https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf) [hereinafter Additional Protocol I].

134. Rule 4. *Definition of Armed Forces*, ICRC Customary Int’l Law Database, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule4](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule4).

135. *Id.*

136. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY 15–16 (2005), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

137. Annex to Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land art. 1, Oct. 18, 1907, [http://avalon.law.yale.edu/19th\\_century/hague02.asp](http://avalon.law.yale.edu/19th_century/hague02.asp).

138. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

irregular armed forces.”<sup>139</sup> All those fulfilling the conditions in Article 43 of Additional Protocol I are armed forces.

### C. *Armed Conflicts to Which Peshmerga Is a Party*

Iraqi-Kurdish Peshmerga, along with Iraq’s security forces, participates in a non-international armed conflict (“NIAC”) against ISIS on the territory of Iraq. This conflict is governed by the Article 3 common to the Geneva Conventions, with customary international law and certain provisions of international human rights law.

In addition, Peshmerga units have participated in operations against ISIS in Syria. Regardless of the Peshmerga’s status under IHL, conflict with ISIS in Syria is also governed by Common Article 3. However, if the Peshmerga can be understood to comprise part of Iraq’s armed forces, the incursion into Syrian territory could rise to the level of an international armed conflict between Syria and Iraq.

Iraqi-Kurdish Peshmerga has also clashed with armed groups affiliated with the (Turkish-Kurdish) PKK, and with Turkmen militias affiliated with the Iraqi Shi’ite *Hashd al-Sha’abi* armed group (which in turn has substantial links to Iran).<sup>140</sup> Depending on the level of intensity, and the nature of their links with Iran, this conflict could in theory reach the level of international armed conflict.

## IV. THE LEGAL STATUS OF THE PESHMERGA

This Part presents a best understanding of the legal status of the Peshmerga in terms of its relationship with the state of Iraq, in light of discrepancy between the de jure and de facto relationships between Kurdish units and Baghdad. First, the question of Iraq’s state responsibility for the Peshmerga will be addressed. Despite the Peshmerga’s factual independence, Iraq probably has responsibility for their actions due to their status under domestic law as part of the Iraqi defense system. Second, having established this, the question of whether the Peshmerga should be understood to be a part of Iraq’s armed forces as a matter of IHL will be addressed. Again, this is probably the case. Third, the possibility that Iraqi officials and officers might have criminal responsibility for Peshmerga violations will briefly be considered, concluding that though de jure responsibility is sufficient to show Iraqi state responsibility, it is insufficient (on its own) to show criminal responsibility. This section will also note tensions arising from the disconnect of these findings from the reality of the relationship between the

139. Rule 4. *Definition of Armed Forces*, *supra* note 134.

140. See Martin & Kozak, *supra* note 57; see also *Hashd Al-Shaabi Targets Kurdish, Turkmen Districts in Tuz Khurmatu*, BasNews, (Oct. 14, 2017), <http://www.basnews.com/index.php/en/news/kurdistan/385328>.

Peshmerga and the state of Iraq. Despite clear legal ties, the relationship is barely existent, with Iraq having little or no control and with Peshmerga commanders not considering themselves to be subordinate.

A. *Iraqi State Responsibility Exists for Any Illegal Actions Committed by the Peshmerga*

As a matter of domestic federal law, Iraqi-Kurdish Peshmerga appears to be part of the Iraqi defense system. This is supported by the Iraqi constitution, Iraq's (official) role in funding Peshmerga salaries, and statements by Kurdish and Iraqi officials.<sup>141</sup> As a matter of IHL, these facts may be sufficient to classify the Peshmerga as part of the armed forces of Iraq.<sup>142</sup> However, the domestic legal link is very likely sufficient to establish Iraqi *State Responsibility* for the Peshmerga's actions. Article 4 of the Draft Articles on State Responsibility is pellucid, holding: "1. The conduct of any State organ shall be considered an act of that State under international law. . . . 2. An organ includes any person or entity which has that status *in accordance with the internal law of the State*."<sup>143</sup>

The commentary to Article 4 elaborates that "the principle . . . applies equally to organs of the central government and to those of regional or local units."<sup>144</sup> Paragraph 9 of the commentary also notes that it is irrelevant that "the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State's international obligations."<sup>145</sup> As a result, for the purposes of establishing State responsibility, it is not necessary for an entity to be directly under the command and control of the State in question. Instead internal law alone is sufficient to create state responsibility, regardless of actual levels of control.

As such, Iraqi *State* responsibility can be established for any illegal actions committed by the Peshmerga, or indeed by the Kurdistan Regional Government. The Peshmerga has status as an organ of the Iraqi State under the Iraqi constitution,<sup>146</sup> under the laws of the KRI<sup>147</sup> (which are recognized

141. See *supra* note 60.

142. See *infra* Section IV.B.

143. Draft Articles on State Responsibility, *supra* note 132, at 84 (emphasis added).

144. *Id.* at 88. The commentary uses the example of the Conciliation Commission in the *Heirs of the Duc de Guise* case:

For the purposes of reaching a decision . . . it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, *notwithstanding the autonomy granted to Sicily in internal relations* under the public law of the Italian Republic.

*Id.* (emphasis added).

145. *Id.* at 41, art. 4 (commentary, ¶ 9).

146. See *supra* Part II.

147. See *supra* Section II.A.

under the Iraqi federal constitution),<sup>148</sup> in Iraqi legislation concerning the funding of the Peshmerga,<sup>149</sup> and through statements of Iraqi officials such as the Iraqi Prime Minister.<sup>150</sup> Further, the KRG—which exercises control over the Peshmerga—does not represent an independent state, but rather is the federally recognized government of an autonomous region of the State of Iraq.

*B. The Peshmerga Should Currently Be Understood as Being Part of the Armed Forces of Iraq*

But the question remains as to whether “state responsibility” can be analogized to “command responsible to a party to a conflict” in order to establish the Peshmerga as a part of the Iraqi armed forces for the purposes of IHL. “Responsibility of the unit to the party should be broadly construed. *Unlike* the general law of state responsibility, [Additional Protocol I] Article 43(1) merely seeks to establish a factual link between the group or unit and the state.”<sup>151</sup> Yet in the case of the Peshmerga, it is not clear whether the legal fact of the Peshmerga’s status under Iraqi law should be controlling, or whether instead it should be the factual reality of the Peshmerga’s near total independence from any chain of command controlled by Baghdad.<sup>152</sup>

Under IHL “the armed forces of the [state of Iraq] will consist of all organized armed forces, groups, and units under a command responsible [to Iraq] for the conduct of its subordinates. These armed forces shall be subject to an internal disciplinary system which shall enforce compliance with the rules of international law applicable in armed conflict.”<sup>153</sup> It may also be necessary to consider whether units have a fixed distinctive emblem, carry arms openly, and conduct operations in accordance with the laws of war.<sup>154</sup> Yet since Peshmerga units do have fixed symbols, carry arms openly, and purport to act in accordance with the laws of war,<sup>155</sup> the most important element for determining the Peshmerga’s status is Additional Protocol I Article 43(1)’s “command responsible to that Party” clause.

Specifically, it must be determined whether (1) “command responsible to that Party” requires an element of control linking between the “command responsible” and the “Party to an armed conflict,” or if the existence of any command structure regardless of links to the State is sufficient, and (2) whether domestic laws and statements are sufficient for the purposes of de-

148. *See id.*

149. *See id.*

150. *Supra* note 61.

151. *See* Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT’L L. 989, 1009 (2008).

152. *See generally supra* Part I.

153. Additional Protocol I, *supra* note 133, art. 43, ¶ 1.

154. Annex to Hague Convention (IV) of 1907 respecting the Laws and Customs of War on Land: Regulation concerning the Laws and Customs of War on Land, *supra* note 136, art. 1.

155. *See generally supra* Part I.

termining “command responsible,” or whether the amount of real-world control the state can exert over the group should instead be considered.

1. *The Meaning of “Command Responsible to a Party to the Conflict”*

The definition of “command responsible to a Party to the conflict for the conduct of its subordinates” is not entirely clear. There is little guidance in either the Commentaries or the *travaux préparatoires* of Additional Protocol I.<sup>156</sup> As a result the language should be interpreted in accordance with the ordinary meaning of the terms in their context.<sup>157</sup> “The ordinary meaning of being ‘responsible to,’ which can be defined as ‘having to report to (a superior or someone in authority) and be answerable to them for one’s actions.’”<sup>158</sup> This plain-meaning analysis of the Additional Protocol I Article 43(1) language suggests that there must be some kind of reciprocal two-way link between the “command” under which the armed force operates, and the “Party to the conflict.”

2. *The Responsibility of the Peshmerga’s Command to the State of Iraq*

Under Article 43(1) of Additional Protocol I, for the Peshmerga to be considered a part of Iraq’s armed forces, there must be a reciprocal link between its command and the state of Iraq. It may be that the link requires the exercise of control by Iraq over the Peshmerga. If, in order to establish this “command responsible” link it is sufficient to only consider Iraq’s domestic laws, then a reciprocal link between the Peshmerga and Iraq (and the KRG and Iraq) will be found, and the Peshmerga must be considered part of the Iraqi armed forces under IHL. However, if the determination requires a factual analysis of the existence of a link between Iraq and the Peshmerga’s command, it may be that the command is not responsible to Iraq and so the Peshmerga cannot be a part of Iraq’s armed forces. This is especially true if the Additional Protocol I Article 43(1) “command responsible” link requires Iraq to exercise *de facto* control over the Peshmerga and KRG.

The Peshmerga is extensively organized<sup>159</sup> and practically falls under the command of the Ministry of the Peshmerga and KRG. The Ministry and KRG have the ability to impose discipline and have demonstrated the ability to plan and carry out military operations. As a matter of domestic Iraqi federal law—if not practice—Iraq seems to have the *legal* ability to control and discipline the Peshmerga. Under domestic law, the Peshmerga is considered part of the Iraqi defense system, with regional security forces and guard established under the federal constitution. Moreover, despite its autonomy, the KRG and its President are subordinate to the Iraqi federal gov-

156. See, e.g., Hoppe, *supra* note 151.

157. Vienna Convention on the Law of Treaties art. 31, Arg.-Austl.-Austria, May 23, 1969. 1155 U.N.T.S. 331.

158. See Hoppe, *supra* note 151 at 1009 (citing the NEW OXFORD AMERICAN DICTIONARY).

159. See generally Chapman, *supra* note 28.

ernment on matters reserved for Baghdad under the constitution.<sup>160</sup> This suggests that Iraq bears legal responsibility in relation to all elements of the Peshmerga's command.

On the other hand, Iraq's federal government has been unable to discipline Peshmerga fighters or order them to withdraw from disputed territories,<sup>161</sup> and Kurdish officials deny accepting orders from Baghdad. Kurdish regional laws and policies make no mention of a link between the Peshmerga and the federal government, and give the KRI President authority over the chain of command. As previously discussed, the Kurdish president can bar federal forces from entering the region, and can deploy the Peshmerga abroad. There is no indication in regional law that the KRG has to ask permission of Baghdad, or that Baghdad wields a veto. The Peshmerga's command is effectively not responsible to Iraq. Thus, to determine its status it must be established whether IHL considers the legality of the Peshmerga's role within Iraq, or the fact that the Peshmerga is nearly totally divorced from the Iraqi government and Iraqi security forces.

To answer whether or not IHL considers Iraq's domestic legal arrangements or the factual relationship between the Peshmerga and federal government, it is helpful to consider the particular difficulties related to contractors and civilians employed by armed forces. Specifically, the ICRC's "*Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*" (Interpretive Guidance) considered the circumstances where civilians and contractors employed by an armed force could be considered members of the armed forces as opposed to civilians.<sup>162</sup> According to the Interpretive Guidance:

[A]s long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians. . . . Where such personnel directly participate in hostilities without the express or tacit authorization of the State party to the conflict, they remain civilians and lose their protection against direct attack for such time as their direct participation lasts. . . . A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, *whether through a*

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160. See generally Part II.

161. See, e.g., Dalshad Abdullah, *Erbil Rejects Baghdad's Request to Stop Peshmerga Advance Towards Mosul*, Asharq al-Awsat (Aug. 20, 2016), <http://english.aawsat.com/d-abdullah/news-middle-east/erbil-rejects-baghdads-request-stop-peshmerga-advance-towards-mosul>. The author quotes Kurdish Government Spokesman Safen Dizayee as saying "The Peshmerga will continue their advance and will not retreat from the areas they have recently liberated from ISIS in Mosul. . . . [T]he Peshmerga will not stop their advance until all Kurdistan territories in the Nineveh region are liberated." *Id.*

162. See generally NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 37–40 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter MELZER, INTERPRETIVE GUIDANCE].

*formal procedure under national law* or de facto by being given a continuous combat function. Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict. . . .<sup>163</sup>

The ICRC purported to base this conclusion on the “prevailing view expressed during expert meetings.”<sup>164</sup> In the Interpretive Guidance, the ICRC considers a formal procedure under national law sufficient to incorporate civilians and contractors into a state’s armed forces, such that they no longer count as civilians for the purposes of the principle of distinction.<sup>165</sup> There seems to be no need for a factual analysis of whether or not individuals and groups legally incorporated into the armed forces are actually directly participating in hostilities. If formal legal incorporation has occurred, all that matters is that employees or contractors *could* perform a continuous combat function on behalf of a State party to the conflict.

While Peshmerga are neither civilian employees, nor contractors, they too can be considered to have been incorporated into the Iraqi armed forces through a formal procedure under national law. Though in fact Peshmerga do not perform their functions on Baghdad’s behalf, their legal incorporation is sufficient for IHL to consider the group a part of the Iraqi armed forces.

While the near complete lack of de facto control on the part of Baghdad over the Peshmerga may be troubling, for the purposes of classifying the Peshmerga under Additional Protocol I, the existence of a de jure command responsible to Iraq appears to be sufficient to consider the Peshmerga as forming a part of Iraq’s armed forces, despite apparent Kurdish and international understandings to the contrary.

### C. *Responsibility under International Criminal Law for the Acts of Members of the Peshmerga*

Unlike the law of state responsibility or IHL, international criminal law is concerned with establishing individual responsibility for international crimes under international law. International criminal law therefore views the de jure versus de facto issues differently to IHL or international law related to state responsibility. The International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Čelebići* Appeal Judgment considered the question of whether de jure status without de facto command is sufficient for ascribing criminal responsibility to individual commanders.<sup>166</sup> The Appeals Chamber answered in the negative:

163. *Id.* at 39 (emphasis added).

164. *Id.* at 39; see *supra* note 71.

165. MELZER, INTERPRETIVE GUIDANCE, *supra* note 161, at 39.

166. See Prosecutor v. Delalic (*Čelebići* Case), Case No. IT-96-21-A, Judgment, ¶¶ 186–99 (Int’l Crim. Trib. for the Former Yugoslavia Appeals Chamber, Feb. 20, 2001); see also Prosecutor v. Halilović & Kubura, Case No. IT-01-47-A, Judgment, ¶ 191 (Int’l Crim. Trib. for the Former Yugoslavia Appeals

In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. . . . In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.<sup>167</sup>

Applying the ICTY's analysis to questions related to the Peshmerga's relationship with the State of Iraq would suggest that despite the Peshmerga being arguably part of Iraq's armed forces and despite Iraq's responsibility arguably being engaged where conduct of the Peshmerga constitute a breach of an obligation of Iraq under international law, this *de jure* status is not alone sufficient to find criminal responsibility on the part of Iraqi officials.

#### D. *Status of the Peshmerga*

As a matter of IHL the Peshmerga must be considered to form part of the Iraqi armed forces. Further, because the KRG and the Peshmerga units are incorporated into the Iraqi defense system as a matter of domestic law, Iraq's state responsibility would arguably be engaged where conduct of the KRG or Peshmerga constituted a breach of an obligation of Iraq under international law, including applicable international human rights law or IHL. As a matter of individual criminal responsibility under international criminal law, Iraqi officials may be able to avoid responsibility where there is a lack of *de facto* control over the units, though (as will be discussed) officials may, under certain circumstances, be liable for failing to prevent, punish, or report war crimes. As long as both the KRG and the Peshmerga remain incorporated in law into the Iraqi defense system, the Iraqi state will be considered responsible for them under international law.

### V. ISSUES ARISING FROM THE PESHMERGA'S LEGAL STATUS

The Peshmerga's legal status is especially significant in light of the numerous human rights and IHL violations documented in the disputed territories and attributed to the Peshmerga. In addition, the Peshmerga's legal status is also important to consider in light of Western practices of supplying and training the Peshmerga. As tensions between Iraq and the KRI come to the fore post-ISIS, the following issues may become more significant.

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Chamber, Apr. 22, 2008); Prosecutor v. Halilović, Case No. IT-01-48-A, Judgment, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber, Oct. 16, 2007); Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-A, Judgment, ¶ 302 (Int'l Crim. Trib. for the Former Yugoslavia Appeals Chamber, May 9, 2007).

167. *Čelebići* Case, Case No. IT-96-21-A, Judgment, ¶ 197.

### A. Iraqi Responsibility

It has been shown that Iraq has state responsibility for the alleged IHL and human rights violations carried out by Peshmerga forces. In addition, because the Peshmerga can be understood as part of the Iraqi armed forces, violations committed by the Peshmerga may lead to a number of additional repercussions for the state of Iraq and its officials.

#### 1. *Command Responsibility for Failure to Prevent, Punish or Report War Crimes*

There is treaty law, customary law, and Iraqi domestic law which suggests that while Iraqi officials probably do not have international criminal liability for the alleged violations themselves, they may still have command responsibility for failing to prevent, punish, or report war crimes.<sup>168</sup> The ICRC's customary IHL study summarizes this rule as follows:

Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.<sup>169</sup>

The rule may be applicable to non-international armed conflicts as well as international armed conflicts. In particular, “the Statutes of the International Criminal Court, of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor explicitly provide for this rule in the context of non-international armed conflicts.”<sup>170</sup>

Iraqi cases carried out under the Law of the Supreme Iraqi Criminal Tribunal (2005) also supported the interpretation of the ICRC, finding officials liable where they knew or had reason to know that a subordinate had committed, or was about to commit a violation, but failed to take the necessary and reasonable measures to prevent it.<sup>171</sup>

So long as the Peshmerga remains an organ of the Iraqi state in law, Iraqi officials risk some level of liability for the force's actions. Alleged abuses in Iraq's disputed territories have been widely reported by Western government agencies and NGOs.<sup>172</sup> Given the current lack of control over the

168. See generally HENCKAERTS & DOSWALD-BECK, *supra* note 135, at 558–63.

169. *Id.* at 558.

170. *Id.* at 560.

171. See generally *Practice Relating to Rule 153. Command Responsibility for Failure to Prevent, Punish or Report War Crimes*, INT'L COMM. OF THE RED CROSS, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule153](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule153).

172. See, e.g., *supra* notes 48–54.

Peshmerga, it seems doubtful that Iraq is currently able to prevent or punish. As a result, it may be that the “necessary and reasonable measures” Iraq is obligated to take under IHL could include taking meaningful control of the Peshmerga, at least to the degree sufficient to prevent abuses, and punish perpetrators. In short, to carry out its IHL obligations and avoid being held responsible for violations, Iraq may find it has two options: take firmer control of Peshmerga operations, or formally divest itself from the Kurdish force in law.

## 2. *Obligation to Pay Damages and Reparations*

So long as the Peshmerga is a part of the Iraqi armed forces, Iraq may also have an obligation to pay reparations for violations committed based on the law of state responsibility,<sup>173</sup> and IHL<sup>174</sup> including in a NIAC.<sup>175</sup> Highlighting these obligations is important because it may be unclear to populations in disputed territories that they have a case to seek restitution and reparation from the federal government, rather than the KRG in Erbil.

Alternately, Iraq could change its law to better reflect the reality of a lack of control over the Kurdish forces in order to avoid incurring liability and obligations to pay damages. Yet such a move might fuel Kurdish calls for independence, and might add to the autonomy of the Peshmerga (by removing even nominal control, further emboldening Peshmerga commanders and KRG officials), so making the breakup of Iraq even more likely, and deepening the rift between Iraqi and Kurdish armed units. While a divestment might shield Iraq from some responsibility for the actions of units it cannot control, it is likely a political non-starter.

## B. *Western Policy*

Western discourse surrounding the status of the Peshmerga frequently suggests that the law is complex (or at least unclear). While it is true that the Peshmerga’s structure and its political relationship with Iraq is complex, an analysis of Iraqi law and international law suggests clear doctrine which permits a straightforward understanding of the Peshmerga as a part of the Iraqi armed forces, and an organ of the Iraqi state. Failure to acknowledge this clear doctrine is harmful to most Western nations’ state policy of opposing the breakup of Iraq.<sup>176</sup> Treatment of the Peshmerga as anything other than an organ of the Iraqi state emboldens Kurdish arguments for indepen-

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173. See Draft Articles on State Responsibility, *supra* note 132, art. 36.

174. See HENCKAERTS, *supra* note 167, at 537–50; see also Additional Protocol I, *supra* note 133, art. 91.

175. See HENCKAERTS, *supra* note 167, at 545.

176. This paper takes no position on merits or demerits of Kurdish independence, and simply notes an instance of contradictory and counterproductive policy in Iraq.

dence.<sup>177</sup> Further, training and arming the Peshmerga without reconciling the Peshmerga with Iraqi forces serve to further the autonomy of the Peshmerga and, by extension, that of the KRI, making Iraq's breakup more likely. Indeed, strengthening the Peshmerga's autonomy from Iraq could make violent clashes more likely.

Attempts to bypass Iraq when funding, equipping, or training the Peshmerga might be considered violations of Iraq's sovereignty, in addition to a potential violation of the principle of non-intervention.<sup>178</sup> Moreover, dealing with the Peshmerga through Memorandums of Understanding is a questionable method to deal with the Peshmerga, so long as (1) Iraqi law remains such that the Peshmerga must be understood to be a part of Iraq's armed forces, (2) Western policy remains opposed to an independent Kurdistan, and (3) Western nations remain committed to respecting principles of international law. So long as these three points remain true, states should commit to treating the Peshmerga as an organ of the sovereign state of Iraq, with ultimate responsibility lying with commanders of the Iraqi armed forces and the federal government in Baghdad.

## VI. CONCLUSION

Given the Peshmerga is likely to remain prominent as questions of territorial control in Iraq come to the fore in the months and years after ISIS's defeat, it will be important that all parties with dealings with the Peshmerga review and clarify their legal understandings of the force. This is especially true in light of the failure of Kurdistan's 2017 independence bid: at the time of editing Iraq looked likely to remain formally united—but tensions between Erbil and Baghdad are greater than ever, and questions concerning control and sovereignty have returned to the fore.

The Peshmerga must be considered an organ of the state of Iraq under international law of state responsibility, and a part of Iraq's armed forces under IHL. Though the relationship is factually complex, it is legally clearer than much of the discourse on the Peshmerga's status would suggest. Indeed, current international understandings of the status of the Peshmerga are anything but clear: though most states have claimed they are training and supplying the Peshmerga with Baghdad's consent, a range of approaches and understanding have emerged. Obfuscation of the legal status of the Peshmerga risks further driving apart the Peshmerga and Iraqi armed forces (and the KRG and federal government), further contributing to confusion and tension.

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177. See, e.g., *Ever Closer to Independence*, ECONOMIST (Feb. 19, 2015), <http://www.economist.com/news/international/21644167-iraqs-kurds-are-independent-all-name-they-must-play-their-cards-cleverly-if-they>.

178. See U.N. Charter art. 2, ¶ 7.

Equally significantly, Iraq currently has state responsibility for an armed force that is alleged to have committed IHL and human rights abuses during the fight against ISIS, despite lacking factual control over it. States currently directly funding and supplying the Peshmerga may be making it harder for Iraq to retain control over the organization and carry out its IHL obligations. To promote better practice, better understanding of the international law relevant to the Peshmerga's status, and better adherence to IHL obligations, a clear and simple legal understanding is likely the best understanding, despite the complex fact pattern.

