

It is politically and morally right for European states to support Kurdish forces in Iraq

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On 15 August, the Council of the European Union stated that it welcomed efforts by EU governments to provide arms to Kurdish forces attempting to halt the advance of Islamic State (IS) militants in Iraq.

Brendan O’Leary provides a comprehensive overview of the political situation in the Kurdistan Region of Iraq and the development of the conflict between Kurdish and IS forces. He argues that it is not only legally permissible under the Iraqi Constitution for foreign governments to arm Kurdish forces, but that it is also politically and morally right for European democracies to do so. Moreover, in contrast to attempts to strengthen the Iraqi federal army, providing support to Kurdish forces is also likely to be highly effective in preventing IS militants from making further military gains within the country.



The [Kurdistan Region of Iraq](#) is the sole surviving success story from the US-led intervention that in 2003 removed from power the genocidal dictator Saddam Hussein, and his Baath regime. Kurdistan’s institutions work – its executive (its presidency, prime minister and cabinet), its parliament, its civil service, courts, police, universities, schools and hospitals. Its officials generally obey the law, except the speeding rules. Corruption is low by regional standards, especially those of Arab Iraq under Saddam and Nouri al-Maliki.

Since 2005 votes determine who governs the region. The [Kurdistan Democratic Party](#) (KDP), led by Masoud Barzani, is the most electorally successful party in this functioning Muslim-majority democracy. It has shared power in coalitions in which two other parties, [Goran](#) (“Change”), and the [Patriotic Union of Kurdistan](#) (PUK), vigorously compete for second place. In the last decade the KDP has led Kurdistan from Erbil, whereas the PUK has led for Kurdistan in Baghdad. Conflict between the KDP and the PUK, which marred the 1990s, is long over, its legacies resolved peacefully and politically. The administrative unification of the region is almost complete.

The Kurdistan Regional Government (KRG) is pluralist, and secular. It not only protects the rights of women, but also has advanced them. Banning and punishing “honour-killings”, it has vigorously promoted women’s education. Female literacy is much higher than in Arab Iraq, reversing the pattern under British colonialism and the Iraqi monarchy, and Iraq’s first republic – and, [as many have suggested](#), female literacy is the best single indicator of development.

In recent weeks much of the world has learned for the first time that Kurdistan protects the rights of its religious minorities – Shiite Muslims, Christians, and Yazidis – and does so with its laws, funds, and its soldiers’ lives. Direct experience had already confirmed this to me: the current Prime Minister, Nechirvan Barzani, requested me to research the status and demands of Kurdistan’s Christians, and other minorities. Conducting this work I discovered his government’s and his personal role in the re-building of minority churches, temples and villages destroyed by Saddam’s Baathists.



Peshmerga outside Kirkuk in Iraq, Credit: Boris Niehaus (CC-BY-SA-3.0)

Kurdistan also respects the rights of other ethnicities, non-Kurds, and non-Kurdish speakers. But in case this essay is mistaken for public relations, Kurdistan's pluralism has the grimmest compelling testimony: it is where "other Iraqis" flee. One in six of the people in its territory is a refugee from Arab Iraq or Syria. That is where humanitarian assistance needs to be concentrated.

Kurdistan has flourished partly because the American and British Coalition Provisional Authority, which tried to remake Iraq as a centralised federation in 2004-5, did not directly govern it. It has developed because it used the rights it won in the making of Iraq's Constitution of 2005 – against British and American preferences – to advance the economic development of its people. The skylines of Erbil, notably its luxury hotels, and its private sector, are unrecognisable compared to twelve years ago when I first advised its government.

Kurdistan has been a success story, so far, because it ignored two insistent pieces of advice from American and British politicians and diplomats. It kept its Peshmerga ("those who fight death"), rather than dissolving them into the federal Iraqi army; and it demanded and accomplished its own independent oil and gas exploration, production and export rights, and made its own laws on these matters. Had it followed American and British advice, Kurdistan would today be under the boots of forces loyal to the newly ousted Iraqi Prime Minister al-Maliki, or, instead, its people would be in flight from the self-appointed Caliph of the "Islamic State," Abu Bakr al-Baghdadi, the man whom [Osama bin Laden](#) thought too wild.

Kurdistan's opportunities and dangers

On June 10 of this year the federal Iraqi army collapsed, and fled from west Mosul, Iraq's second largest city. The previous week its elected governor had spoken with me about his plans to convert the province of Nineveh, of which Mosul is the capital, into a region with the same constitutional status as Kurdistan. Now he is in exile in Kurdistan – among his personal miseries, his horses, his private pride and joy, have been looted.

The collapse of the federal Iraqi army in Sunni Arab majority areas was widespread. It had already lost the city of Fallujah and Anbar province in January. In June it also abandoned its positions in the so-called "disputed territories" between Kurdistan and Arab Iraq, including the city and province of Kirkuk, leaving its posts to the Peshmerga. Overnight the Kurds of Iraq had, it seemed, control over all the territories they had historically sought to reunify as parts of Kurdistan – places in which Kurds were a clear majority now, or had been before Saddam. Maliki's government, with the collusion of the US and the UN, had prevented referendums from being held in these places, despite a timetabled mandate in Article 140 of Iraq's Constitution.

The Iraqi federal government was clearly in deep trouble. Its prime minister, the simultaneously despotic, nepotistic, frightened and authoritarian Maliki was bewildered, but determined to hang on to office, claiming to have just "won" the most recent federal elections. He did have a plausible claim, as the leader of what appeared to be the largest bloc, to be nominated to try to form a government – a claim he had previously prevented Ayad Allawi, the leader of the largest bloc in 2010, from being able to exercise.

Maliki was destined to be ousted. No representative Sunni Arab or Kurdish member of the federal parliament would work with him. He lacked majority support among Shiite parliamentarians, and had no prospect of constructing a parliamentary majority. His support evaporated when Ayatollah Sistani, senior Shiite clergy and politicians, and both Iran and the US, the curious partners in supporting a strongman in Baghdad, indicated that a different person was required to win back Sunni Arab and Kurdish consent to a re-made Iraq.

Maliki resigned last week. Apparently he has been given assurances that he would enjoy immunity from prosecution. Maybe so, but the assurances have no warrant under Article 73 (1) of the Constitution*, which prevents the President and Prime Minister from pardoning those convicted of financial and administrative corruption. But Maliki, of whom I have pictures as an unknown figure sitting silently beside Kurds in the making of Iraq's Constitution, has never acted on constitutional assumptions. In his place has emerged Haidar al-Abadi, a long-serving member of the Dawa party that has provided Iraq's last two prime ministers. He has a mandate from the new Kurdish President,

Fuad Masum, to try to form a new federal council of ministers within a month. Do not hold your breath – the formation of the last Maliki government took almost a year.

While Maliki's fall was in train it appeared Kurdistan's moment had arrived. Masoud Barzani announced there would be a referendum – though the question(s) and approval would have to come from Kurdistan's parliament. The more cautious Nechirvan Barzani said there was no going back to the Iraq of before June 10 – in which Maliki was refusing to pay Kurdistan its share of Iraq's budget in an ill-conceived plan to starve it into surrender, and to force it to abandon its lawful plans to export its own oil and gas. The referendum would either affirm Kurdistan's secession from Iraq, or, more likely, specify its status as a sovereign state with the right to negotiate its independence. It is also possible the referendum(s) would be confined to implementing Article 140, which the federal government had manifestly failed to do.

The region and the world recognised that a major change had occurred. The federal government was visibly collapsing, and the Kurds were the sole reliable force standing in the path of the self-proclaimed Caliph. It seemed that Baghdad's difficulty was Kurdistan's opportunity, and so it may yet prove. But events in early August demonstrated that Kurdistan's path to freedom would not be easy.

The world's TV screens have just shown the last stranded platoons of Arabic-speaking Christians fleeing from Mosul, running from those intent on looting their homes – quaintly described as imposing a poll tax on the dhimmi. In Sinjar, the democratic world has seen the threat posed to Kurdistan's status as a pluralist safe haven by [ISIS-ISIL-IS](#). The debate over the appropriate acronym for these Islamist thugs was as confusing to many as those over the numbers of stranded refugees, the details of Yazidi theology, and how to pronounce the Yazidis' name (*Ya-zeed-ees*). But the big picture was clear: al-Baghdadi's bloody rampages had created a common enemy for Iranians, Turks, Americans, Europeans, Shiite Arabs and moderate Sunni Arabs, in which the Kurds were the sole pro-western figures in good local standing.

Ominously, however, the last two weeks have shown that the Peshmerga could be taken by surprise, just like the federal Iraqi army. In several clashes with ISIS, the Peshmerga had to retreat because of the latter's better weaponry – though their forces retreated in good order, unlike the federal army, and were subsequently able to make good some of their losses.

Kurdistan has a new one thousand kilometre southern border, largely with ISIS-controlled places. ISIS is an organisation that I will not call barbaric because that would do an injustice to barbarians. But it is clear that the Peshmerga need re-supplying because the federal Iraqi army has left ISIS in possession of the latest American weaponry – materials that both Baghdad and Washington had previously prevented reaching the Peshmerga. These new realities pose several questions both for Kurds and for their freshly awakened western allies.

Let me begin, however, with a legal question, because it preoccupies the minds of many Europeans, especially but not only Germans, and especially critics of the intervention into Iraq under the leadership of George Bush and Tony Blair.

Is it lawful to arm the Kurds of Iraq?



Nouri al-Maliki, Credit: Jessica J. Wilkes (Public Domain)

On 15 August the Council of the European Union [stated](#) that it welcomed “the decision by individual Member States to respond positively to the call by the Kurdish regional authorities to provide urgently military material.” It went on, “Such responses will be done according to the capabilities and national laws of the Member States, and with the consent of the Iraqi national authorities.” The advice of the Library of the House of Commons to British MPs on the same subject may be found [here](#).

Both documents reveal erroneous qualms about the status of the Peshmerga. They also unnecessarily grant the federal authorities in Baghdad a veto they do not possess (and which they would be foolish to exercise). The Constitution of Iraq recognises all of Kurdistan’s laws passed between 1992 and 2005, when it was de facto autonomous, and out of Saddam’s control, provided they are consistent with Iraq’s Constitution (Article 141). Under Law Number 5 of the Kurdistan National Assembly (1992) the Peshmerga are the lawful army of Kurdistan. The Peshmerga therefore are a lawful part of Iraq’s security forces under this provision, because the relevant laws are consistent with Article 121(5) of the Constitution, which in English, reads as follows:

The 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.

The most commonly used Kurdish word for “security forces” and “guards” is “Peshmerga.”

In 2005 Kurdistan was determined to preserve the Peshmerga, and to prevent the Iraqi army, which had committed genocide against its citizens, from having any rights to enter its soil without its permission. So it ensured that the federal government’s security powers would be severely limited. Article 110 lists the small number of exclusive powers of the federal government. Read it, if you are doubtful. It won’t take long: it is the smallest number of powers possessed by any federal government in the world. It does not include any reference to the internal security of regions. Kurdistan also ensured – in two separate articles, 115, and 121(2) – that the regional government could veto or amend any federal law outside the exclusive powers of the federal government.

Any clash of laws – for example over Iraq’s Weapons Act of 1992, amended in 2012 – over internal security would therefore have to be resolved in favour of Kurdistan. The meaning of the “administrative requirements” necessary for Kurdistan to perform its internal security functions has not been tested in any court. But the region can reasonably buy light or heavy arms and ammunition, tanks, helicopters or planes, consistent with the threats posed by ISIS, especially when the federal government’s army is not operative.

It is simply not the case that the federal government’s powers over Iraq’s borders or over foreign policy, listed in Article 110, apply to the internal security of Kurdistan. All that the Constitution requires Kurdistan to do is to co-operate with the federal government in the external defence of Iraq’s borders. Article 110 (2) of Iraq’s Constitution of 2005 makes “formulating and executing national security policy” an exclusive power of its federal government, but Article 121(5) provides that regional governments have responsibility for internal security in their regions. So provided foreign governments are not arming the KRG deliberately to break-up Iraq’s borders, or to endanger Iraq, there is no constitutional obstacle to the KRG receiving arms, equipment and advice to fulfil its functions under Art. 121 (5). Foreign governments may therefore militarily provision the KRG, without disrespecting Iraq’s Constitution, but also without requiring the consent of the Baghdad government, just as long as the arms and support are to be used for the internal security of the region.

If this argument is accepted, then it follows with even more logical force that foreign governments may lawfully purchase Kurdistan’s oil and gas production – because the Constitution [grants](#) the federal government absolutely no exclusive powers over oil and gas whatever (and therefore regional law prevails in the event of a clash of laws between regions and the federal government). This additional constitutional argument matters precisely because its acceptance will credibly enable the KRG to pay for its own arms on its own terms.

A fairer question would be whether the threat posed by ISIS is purely “internal” to the Kurdistan Region. For those who think that the Constitution of Iraq is still valid, it is clear that ISIS holds Iraq’s Constitution in contempt, and has threatened all of Iraq, including its borders and its external borders, by declaring a state which includes Syria and Iraq within its alleged territory, and in fact sets no limits to the boundaries of its caliphal ambitions. The KRG is obliged, under the Constitution, to co-ordinate with Iraq in defending the external borders of Iraq – in this case part of Iraq’s border with Syria, but no such requirement applies to defending the internal territory of the KRG.

What is to be done?

Questions of constitutionality and legality matter deeply, but it is separately politically and morally right for European democracies to support the Peshmerga. European Governments recognise this is not 2003. No one is manipulating information to encourage a major western intervention in an authoritarian dictatorship. No western politician is seeking to act unlawfully – indeed, western governments are painfully fearful of doing so. American and European politicians arguably spent the first half of the year trying to look away from Iraq as long as possible, convinced that their public has no appetite for intervention, humanitarian or otherwise.

Not only are the Peshmerga the lawful army of the Kurdistan Region but they also are the sole viably well-organised military in Iraq that is under proper civilian and democratic control. Moreover, aid to the Peshmerga will work. Revivifying the Iraqi federal army – if that ever happens – will take far too much time to accomplish holding back ISIS, whereas injecting sufficient resources to make the Peshmerga fulfil their defensive tasks is an entirely viable mission. Supporting the Peshmerga will also ensure that neither western nor Turkish governments need put armed troops into field combat against the pretenders to the Caliphate. President Barzani has insisted that the Peshmerga require no foreign troops on the ground to help them. What they need is the equipment, and associated training, to counter the American equipment handed over to ISIS by the federal Iraqi army.

The scenarios ahead

The success or failure of the negotiations now to be led by al-Abadi to establish a new Council of Ministers and a programme of government will determine whether Iraq will be renewed according to the provisions of the Constitution of 2005, which have been so travestied by Prime Minister Maliki and his Dawa party, and by those outside governments who have misleadingly supported Maliki.

The US, and its de facto partner on this matter, Iran, still seem formally mission-committed to the project of keeping Iraq together under its Constitution. But simply going back to the Constitution of 2005, however, lacks credibility for both Sunni Arabs and Kurds, who will not be placing their trust in al-Abadi, or his newfound foreign allies. The Kurds distrust the US because the State department’s interpretation of the Constitution of 2005 simply disrespected what the Kurds had achieved in their negotiation of that Constitution. Sunni Arabs also distrust the US because America manifestly failed to deliver on an admittedly near impossible task – the appropriate inclusion of Sunni Arabs in a post-Saddam Iraq, for which both Sunni Arabs and Americans jointly hold blame, along with Shiite politicians.

Though, so far, al-Abadi is assumed to be a better and more congenial person than Maliki, with no record of criminal abuse of power, or violations of human rights, he has faithfully supported the outgoing premier’s policies. He also appears to have granted Maliki immunity (under powers he does not possess) for the numerous crimes he has committed, and to be strongly associating himself with those Shiite leaders, notably Shahrastani, who have been determined centralist enemies of the deeply federal ethos Constitution of 2005. But each move he makes to relax the supporters of Maliki correspondingly undermines the confidence of the Sunni Arabs and Kurds whom he needs to persuade to join him.

It is possible, though unlikely, that constitutional renewal will occur. It was made deliberately difficult to amend Iraq’s Constitution. And, depending on drafting rigour, one can reasonably imagine the necessity of over twenty amendments for immediate enactment. Two other possibilities are more likely. One is that a fresh beginning is made through a new confederal treaty between Kurdistan and (Arab-majority) Iraq. This would recognise Kurdistan as fully

sovereign in its expanded domain, and confine the joint relationships largely to external defence and the sharing of revenues from previously exploited oil fields. It would need to be accompanied by a programme to convert Sunni Arab Iraq into a region, or series of regions, like Kurdistan – a task that will also require the unseating of ISIS from western Iraq, no small matter.

The other possibility, of course, is that Iraq breaks up, into three component parts: Kurdistan, Shiastan, with ISIS and others battling for power over most of Sunni Arab Iraq – and Shiite-majority Baghdad. But the transition to three states cannot be easily accomplished, or internationally mid-wifed, with any ease, and ISIS is no one's negotiating partner.

An *Economist* [editorial](#) has put the western perspective well, “The trickier question for Mr Obama is what to do if Iraq lives down to expectations, and fails to get a better prime minister or a more inclusive government. The jihadists’ ambitions to establish an Islamic caliphate cannot be tolerated. But an all-out assault may bolster Sunni support for IS and risk the disintegration of Iraq. The Kurds live in a more-or-less defined territory: it is possible to imagine the formation of an independent Kurdish state. Sunnis and Shias do not. A break-up of the country could lead to bloodshed on an unprecedented scale. The capital is shared by the sects, as are surrounding areas. America may then be reduced to conducting occasional punitive missions to keep IS contained.”

Note, however, that despite the expression of empathy, the hidden premise of this editorial is that “right-minded” people in the West should want Kurdistan to stay in Iraq to keep it together, rather than for the benefit of the Kurds. But this hidden premise is no longer credible, or enforceable. Kurds are determined that it is Kurdish interests, and of those content to live with Kurds, which must prevail in a newly confederal Iraq, or through the establishment of an independent Kurdish state.

Western powers will matter critically in providing arms, equipment and logistical support to the Peshmerga, and in purchasing Kurdistan's oil and gas, but the most decisive regional actor will be Turkey, under its newly elected President Erdoğan, and his likely new Prime Minister Ahmet Davutoğlu. The largely unrecognised achievement of both Turkey and the KRG is their successful move from detente and rapprochement into what amounts to an alliance. Turkey sees Kurdistan as a regional ally, a buffer state, and a conduit to make Turkey the energy export hub for the European Union. It also sees the KRG as a critical means to a final settlement with its own Kurds, especially those in the PKK. Turkey's formidable military power is currently checked by ISIS's capture of diplomatic hostages, but it is clear that Erdoğan would prefer to achieve by diplomacy what would be costlier to achieve by committing troops. He has called on Europe and America not to take sides between Erbil and Baghdad, and purchase Kurdistan's oil, which is, of course, to take sides – as it happens, the right side, legally and politically.

Tacitly supporting Al-Baghdadi may have seemed useful to some Turks, in order to damage Assad's regime in Syria, but those who hold that opinion are now very worried about “blowback.” Turks will also have noticed that while they are handicapped by hostages, ISIS has engineered something remarkable in Kurdish history – a unified pan-Kurdish front among the diverse militias of Syria, Turkey, Iran and Iraq. When the Peshmerga of the KRG got into trouble they were materially aided by the recently combat-hardened forces of the PKK, and its Syrian affiliate, the PYD, and say some, by Kurdish forces from the guerrillas ranged against Iran. If so, this is truly a novel moment in the annals of greater Kurdistan. It certainly does not mean that a Greater Kurdistan is imminent; but it does signal that Kurds are prepared to face death rather than witness the extinction of the Lesser Kurdistan that now exists on the soil of what was formerly known as northern Iraq.

Few Kurds are relaxed right now, but a joke is making the rounds in Erbil. When a sovereign state of Kurdistan is established, with its capital in Erbil, three statues will be quietly erected – one to al Baghdadi, one to al-Maliki, and another to L. Paul Bremer III, the Administrator of the Coalition Provisional Authority. In politics it matters to get the right enemies as well as the right friends.

**This article uses the numbering and translation of the Constitution of Iraq (2005) published by the Iraqi Council of Representatives Media Directorate – previously available at www.parliament.iq*

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About the author

Brendan O’Leary – *University of Pennsylvania*

[Brendan O’Leary](#) has been Lauder Professor of Political Science at the University of Pennsylvania since 2003. He was an advisor to the Kurdistan Regional Government during the making of Iraq’s Constitution. He was previously a Professor of Political Science at LSE, where he obtained his PhD.



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