

Remarks by

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Thank you for inviting me to participate in today's important discussion about Article 140 of the Iraqi constitution. It is great to be here, see old friends – and make new ones.

Sixteen years ago I addressed a conference of Iraqi Kurds in Suleimania calling for “Buji, Azadi, and Democraci.” These same principles guide the democratic development of Iraq and Iraqi Kurdistan today. Given Iraq's mosaic of ethnic and religious groups, the best way to advance minority rights is through a comprehensive bill of rights that benefits all citizens. Power-sharing can also help harmonize competing claim in Iraq and other war-torn countries with a history of communal conflict. Special measures protecting and promoting minority rights maximize peace, progress and social cohesion.

#### International Standards

Minority rights have a long history under international law, going back as far as the Treaty of Westphalia in 1648. Over the past fifty years, the international community has developed a broad set of standards for minority rights. The two over-riding issues under international law are equality/non-discrimination and protection and promotion of the unique identity of minorities. In addition to national constitutions and statutory law, equality and non-discrimination have been translated into juridical standards and are part and parcel of all of the major human rights treaties.

The principles of non-discrimination and equality are established in the UN Charter and the two major human rights covenants -- the International Covenant on Civil and Political Rights (“CCPR”) and the International Covenant on Economic, Social and Cultural Rights (“CESCR”) – and elaborated in the International Convention on the Elimination of all Forms of Racial Discrimination (“CERD”).

The International Covenant on Economic, Social and Cultural Rights holds: “In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” According to the UN Human Rights Commission, “Individual rights ... depend on the ability of the minority group to maintain its culture, language or religion. Positive measures may be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group.” The 1992 UN General Assembly “Declaration on Minority Rights” requires that States recognize minority rights in their national laws and policies;<sup>1</sup> adopt legislative and financial measures to ensure the effective implementation and enforcement;<sup>2</sup> and undertake regular evaluations, planning and oversight to ensure accountability and provide effective remedies when minority rights are violated.<sup>3</sup>

Further elaboration of minority rights is found in Article 27 of the CCPR, which holds:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Article 27 has been interpreted and developed by the reports and general comments of the body charged with the CCPR’s enforcement– the UN Human Rights Committee (“HRC”). General Comment No. 23, issued by the HRC in 1994, elaborates the content of Article 27, underscoring the affirmative obligations that the Article places on state parties:

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its unique culture, language or religion. Accordingly, positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group.<sup>4</sup>

The HRC has established a Working Group of the Sub-Committee on Prevention of Discrimination and Protection of Minorities to work in coordination with the CERD to monitor compliance of minority rights.<sup>5</sup> In 1992, the United Nations General Assembly adopted a declaration addressing minority rights directly – the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (“Declaration on Minority Rights”). In the absence of a UN treaty devoted to minority rights, the Declaration represents a universal baseline standard for minority rights under international law.<sup>6</sup> Standards are also articulated in the Council of Europe’s Framework

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<sup>1</sup> CCPR, Article 2.2, CESCR, Article 1.2 Minority Rights Declaration.

<sup>2</sup> CERD Article 2.

<sup>3</sup> CCPR Article 2.3.

<sup>4</sup> HRC, General Comment 23, (1994) (GC#23), para 3.

<sup>5</sup> <http://www.un.org/rights/dpi1774e.htm>

<sup>6</sup> The UN Working Group on Minorities has provided an authoritative interpretation of the Declaration authored by the Working Group’s Chair Asbjorne Eide. (“WG Commentary”)

Convention the Protection of Minorities and the 1990 Copenhagen Document of the Organization for Security and Cooperation in Europe.<sup>7</sup>

### Obligations

International law requires that states take certain measures to effect (to those) substantive human rights obligations including minority rights. In particular, states are obligated to:

- (i) Recognize minority rights in their national laws and policies;<sup>8</sup>
- (ii) Adopt legislative and financial measures to ensure the effective implementation of minority rights;<sup>9</sup>
- (iii) Implement legislative and enforcement measures to ensure that minority rights are not threatened by the state or third parties;<sup>10</sup>
- (iv) Provide effective remedies for violations of minority rights; and<sup>11</sup>
- (v) Undertake regular evaluations, planning and oversight to ensure accountability and progressive realization of minority rights.

Following is a summary of state obligations:

### Governance

#### *Self-Governance*

(a) States shall respect the right of persons belonging to minorities to participate effectively in decisions on the national and regional level concerning the minority to which they belong or the regions in which they live.<sup>12</sup>

(b) States shall respect the rights of minorities to participate effectively in public life, including through elections, holding public office and participating in other political and administrative functions.<sup>13</sup>

(c) States shall respect the rights of minorities to assemble and form associations and political parties and thereby aggregate their interests to make the greatest impact on national and regional decision-making.<sup>14</sup>

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<sup>7</sup> <http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>;

<sup>8</sup> CCPR, Article 2.2, CESCR, Article 1.2 Minority Rights Declaration.

<sup>9</sup> CERD Article 2

<sup>10</sup> GC #23

<sup>11</sup> CCPR Article 2.3.

<sup>12</sup> Declaration on Minority Rights Article 2(3); European Framework, Article 15; Copenhagen Document, Article 31;

<sup>13</sup> Declaration on Minority Rights Article 2, GC 23, para 7; WG Commentary para 36

<sup>14</sup> Declaration on Minority Rights Article 2, GC 23, para 7; WG Commentary para 36

(d) States shall duly consider the best manner of achieving effective political participation of minorities, including autonomy arrangements.<sup>15</sup>

(e) In planning and implementing national policies and programs or international programs of cooperation and assistance, states shall give due regard to the legitimate interests of persons belonging to minorities and shall establish advisory or consultative bodies involving minorities within appropriate institutional frameworks.<sup>16</sup>

### *Judiciary*

(a) In applying national laws and regulations to certain minority populations, states shall give due regard to their customs or customary laws.<sup>17</sup>

(b) States shall respect the right of certain minority populations to retain their distinctive juridical customs, traditions, and procedures and practices, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.<sup>18</sup>

### *Police and Security*

(a) States shall respect the rights of minorities to participate effectively in public security and policing functions.<sup>19</sup>

### *International Representation and Agreements*

(a) States shall respect the right of certain minorities to the recognition, observance and enforcement of treaties, agreements, and other constructive arrangements concluded with states or their successors and to the resolution of conflicts arising out of these by competent international bodies agreed to by all parties concerned.<sup>20</sup>

(b) States shall respect the right of minorities to establish and maintain unimpeded contacts among themselves within their country as well as across frontiers with citizens of other states with whom they share a common ethnic or national origin, cultural heritage, or religious belief.<sup>21</sup>

(c) States shall recognize the rights of members of minorities to form and join associations and trade unions.<sup>22</sup>

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<sup>15</sup> WG Commentary para 20;

<sup>16</sup> Declaration on Minority Rights Article 5(1); WG Commentary para 48; ILO 169, Article 33(2)(a)-(b)).

<sup>17</sup> ILO 169, Article 8.

<sup>18</sup> ILO 169, Article 8(2); Draft Declaration on Indigenous Rights, Article 4.

<sup>19</sup> As included in general right to participate in public life and administrative functions Declaration on Minority Rights Article 2, GC 23, para 7; WG Commentary para 36

<sup>20</sup> Draft Declaration on Indigenous Rights, Article 36).

<sup>21</sup> CCPR, Article 22(1); Declaration on Minority Rights Article 2.5, Copenhagen Document, Article 32(4).

<sup>22</sup> CCPR, Article 8(1)(b); Draft Declaration on Indigenous Rights, Article 18.

## *Movement of Peoples*

(a) States shall respect the right of members of minorities to liberty of movement within the country, the freedom to choose one's residence and the freedom to leave the country.<sup>23</sup>

(b) States shall refrain from measures which alter the proportions of the population inhabited by persons belonging to minorities and are aimed at altering the rights enjoyed by such minorities.<sup>24</sup>

(c) States shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.<sup>25</sup>

(d) States shall respect the right of members of certain minorities not to be relocated - except in exceptional circumstances - without their free and informed consent.<sup>26</sup>

## Culture

### *Education*

(a) States shall recognize the right of members of minorities equal access to education and shall not establish or maintain separate educational systems on the basis of membership in a minority.<sup>27</sup>

(b) States shall recognize the right of members of minorities to organize their own education programs, including the establishment and maintenance of schools.<sup>28</sup>

(c) States should take measures in the field of education to encourage knowledge of the history, traditions, language, and culture of minorities.<sup>29</sup>

### *Language*

(a) States shall not discriminate against members of minority groups on the basis of language.<sup>30</sup>

(b) States shall protect the existence and identity of linguistic minorities.<sup>31</sup>

(c) States shall take measures to encourage knowledge of, and the ability to take instruction in, the language of minorities existing within their territory.<sup>32</sup>

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<sup>23</sup> CCPR, Article 12(1) and 12(2); Universal Declaration of Human Rights, Articles 13(1) and 13(2).

<sup>24</sup> European Framework, Article 17

<sup>25</sup> European Framework, Article 5

<sup>26</sup> ILO 169, Article 16(2).

<sup>27</sup> Covenant Against Discrimination in Education ("Covenant on Education"), Article 1; CERD, Article 5(e)(v).

<sup>28</sup> Covenant on Education, Article 5(1)(b); CDESCR, Article 13(3); CCPR, Article 18(3);

<sup>29</sup> Declaration on Minority Rights, Article 4(4). Convention on the Rights of the Child, Article 29.1(c).

<sup>30</sup> Universal Declaration of Human Rights, Article 2; CCPR Article 2(1).

<sup>31</sup> Declaration on Minority Rights, Article 1(1).

(d) States shall recognize the right of members of minorities to establish and maintain educational systems providing education in their own languages and should to the extent possible provide subsidies for such schools.<sup>33</sup>

(e) States shall adopt measures to inform members of minority groups of their rights and duties in their own language.<sup>34</sup>

(f) States shall respect the rights of a member of a minority to be informed and conduct juridical proceedings in a language which he/she understands and to have the free assistance of an interpreter if necessary.<sup>35</sup>

(g) In areas traditionally inhabited by substantial numbers of a particular minority, states shall endeavor to display traditional local names, street names and other topographical indications intended for the public in the minority language.<sup>36</sup>

### *Religion*

(a) States shall not discriminate against members of minorities on the basis of religion.<sup>37</sup>

(b) States shall respect the right of members of minorities to manifest their religious beliefs and to establish religious institutions, organizations and associations.<sup>38</sup>

(c) States shall respect the rights of members of minorities to establish and maintain contact with individuals and communities in matters of religion at the national and international levels;

(d) States shall respect the rights of members of minorities to make, acquire and use articles and materials related to religious beliefs.<sup>39</sup>

### *Media*

(a) States shall ensure by legislation that members of minority groups are not discriminated against in their access to the media.<sup>40</sup>

(b) States shall adopt adequate measures to facilitate access to, and the possibility of creating and using, the media for members of minorities.<sup>41</sup>

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<sup>32</sup> Declaration on Minority Rights, Article 4.3 and 4(4).

<sup>33</sup> Declaration on Minority Rights, Article 4.3; WG Commentary para 63; Convention Against Discrimination in Education, Article 5(1)(c); Draft Declaration on Indigenous Rights, Article 15;

<sup>34</sup> Declaration on Minority Rights.

<sup>35</sup> European Framework, Article 10.

<sup>36</sup> European Framework, Article 11.

<sup>37</sup> CCPR, Article 2(1), 26; CESCR, Article 2; Declaration on Minority Rights, Article 2.1: Universal Declaration of Human Rights, Article 2.

<sup>38</sup> CCPR, European Framework, Article 8, Copenhagen Document, Article 33.

<sup>39</sup> The Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion or Belief. (UNG.A. Res. 36/55, UN GAOR, 36<sup>th</sup> Sess. (1981))

<sup>40</sup> European Framework Article 9.

## *Cultural Identity*

(c) States shall respect the right of members of minorities to freely determine their cultural identity and to freely pursue their cultural development.<sup>42</sup>

(d) States shall undertake to promote the conditions necessary for members of minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.<sup>43</sup>

(e) States shall undertake initiatives in the field of education in order to encourage knowledge of the culture of minorities existing within their territory.<sup>44</sup>

## Economy

### *Economic Development*

(a) States should consider appropriate measures so that persons belonging to minorities may participate fully in the economic progress and development of their country.<sup>45</sup>

### *Natural Resources*

(a) States should consult and ensure the effective participation of members of a minority with regard to the development of land and natural resources which affect them.<sup>46</sup>

(b) States should respect the rights of certain minorities to own, develop, control and use the natural resources on those territories that they have traditionally occupied.<sup>47</sup>

(c) In cases in which the State retains the ownership of mineral or sub-surface resources of lands occupied by certain minorities, governments shall consult them before exploiting such resources and such minorities should benefit in any exploitation of such resources.<sup>48</sup>

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<sup>41</sup> European Framework Article 9.

<sup>42</sup> CCPR, Article 1; CESCR, Article 1; Draft Declaration on Indigenous Rights, Article 3.

<sup>43</sup> CESCR, Article 15; Convention on the Elimination of Racial Discrimination, Article 2(2); ILO Convention no. 107, Article 27(2)(a); ILO Convention no. 169, Article 4.1; UN Declaration on the Rights of Minorities, Article 1(1), Article 4.2; Copenhagen Document, Article 33, 35.

<sup>44</sup> UN Declaration on the Rights of Minorities, Article 4(4).

<sup>45</sup> Declaration on Minority Rights Article 4.5.

<sup>46</sup> Declaration on Minority Rights Article 2.3; WG Commentary para 71; ILO, CCPR 27, GC 23#7, ILO Convention No. 169, Article 1(1), .

<sup>47</sup> Draft Declaration on Indigenous Rights, Articles 26 and 28.

<sup>48</sup> ILO 169, Article 15.2.

## *Property and Land Management*

(a) States shall recognize the rights of ownership and possession of certain minorities over the lands which they have traditionally occupied and shall penalize the unauthorized intrusion on such lands.<sup>49</sup>

(b) States shall respect the rights of collective ownership and use of land which are established by the customs of certain minority populations.<sup>50</sup>

## Decentralization/Autonomy

Decentralization and autonomy arrangements can enhance statutory measures aimed at realizing the goal of equality and non-discrimination. A growing body of autonomy precedents exists for groups with historical ties to a specific territory and a history of self-governance.<sup>51</sup> Some models invest all powers in the state government unless specifically allocated to its entities.<sup>52</sup> Other models allow states entities to retain powers not specifically granted to the state.<sup>53</sup> Chapter XI of the UN Charter stipulates that non-self-governing territories "can achieve the full measure of self government" as a sovereign state or through free association with and/or integration with an independent state "on the basis of complete equality."<sup>54</sup>

Just as Iraqi Kurdistan requires decentralized self-governance, groups within Iraqi Kurdistan should have the opportunity to manage their own affairs. Power-sharing at the local level would assuage the concerns of ethnic and religious minorities within Iraqi Kurdistan and, in both spirit and substance, provide a model for power-sharing in Iraq as a whole.

## Consultation

This requires consultation. Ethnic or religious groups may turn to violence when they lack recourse through the political system. To address their grievances, they must be convinced that political participation can enable their aspirations, institutions exist to safeguard their interests, and effective international guarantees are in place to support the realization of their goals.

Constitution-making must be a transparent and consultative process that ensures the buy-in of affected groups. To this end, the state should convene a constitutional commission that reflects the ethnic and/or religious character of groups residing on its territory. Commissioners should have technical expertise and/or be persons of high moral standing within their communities. They should also work with community leaders to seek input from civil society early in the

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<sup>49</sup> ILO 169 Articles 17 and 18; CCPR Article 27 and GC#23 para 3.2.

<sup>50</sup> ILO 169 Articles 13 and 17, Draft Declaration on Indigenous Rights, Article 13.

<sup>51</sup> See generally, Geoff Gilbert, "Autonomy and Minority Groups: A Right in International Law" 35 *Cornell Int'l L.J.* 307 (2002); Philip Alston "Peoples' Rights: Their Rise and Fall" in (P. Alston ed.) *Peoples' Rights* (2001)

<sup>52</sup> For example, India.

<sup>53</sup> Examples are Greenland, Hong Kong, Mindanao, and South Tyrol.

<sup>54</sup> UN General Assembly Resolution 1541 (1960).

process and establish a mechanism for conveying proposals to the commission. The draft constitution should be thoroughly vetted at town hall meetings or other traditional consultative processes. The polity must feel as though they have had input at every stage so that the final charter reflects its disparate views and requirements.

International experts can play an important role. Vast international expertise exists on constitution-making in post-conflict settings. To harness this know-how, an informal advisory group could be established to provide guidelines, review drafts and make sure that the final product is consistent with international standards.

### The Way Forward

A draft constitution has been prepared for Iraqi Kurdistan. It is a work in progress. Finalizing the constitution should be considered as a high priority by the KRG. It must not languish.

It is an essential part of nation-building and a way to demonstrate to the world that Iraqi Kurdistan is ready for self-rule. Drafters should make every effort to prepare a charter that is consistent with the principles of Iraq's national constitution. If Iraq falls apart, however, Iraqi Kurds want to have a fully developed system for democratic self-governance. The charter of an Iraqi federal state called "Iraqi Kurdistan" may someday be the yardstick by which the international community measures Iraqi Kurdistan's readiness to join the family of nations.

Thank you.