

Article 140 and the Future of Iraq

Friday May 9, 2008

Event Summary

Washington, D.C. - On May 9, 2008, the Washington Kurdish Institute (WKI), the Penn Program in Ethnic Conflict at the University of Pennsylvania, and the Kurdish National Congress of North America (KNC) hosted an all-day conference in the Rayburn House Office Building on Capitol Hill. The focus of the conference was Article 140 of the Iraqi Constitution, which mandates a process of normalization and referendum for disputed territories.

Dr. Najmaldin Karim, President of WKI, opened the conference with a warm welcome and a moment of silence for those who have sacrificed their lives to fight against tyranny. Dr. Karim's remarks underscored that Article 140 was the most pressing issue in Iraq today, with campaigns of gerrymandering, expulsion, and ethnic cleansing by the Baathist regime that have yet to be addressed, as obligated by the Iraq constitution. Regarding Kirkuk, Dr. Karim said that the governorate needs a clear administrative direction, and that dithering is inimical to the growth of civil society and development in the province; he posited that "the best outcome for Kirkuk's prosperity is a 'special status' within the Kurdistan Region," with a locally elected government that represents all of its communities.

Gen. Jay Garner said that his passion for the region began 17 years ago, at a time when the American people and administration knew little about the Kurds. Gen. Garner described the Kurds as the most vibrant people that he's ever met, with a range of skills that are noticed today by investors, and the security in Iraqi Kurdistan as the finest in the Middle East. He also described their democratic values and emphasis on minority rights, citing the Christians and Arabs that have migrated to Kurdistan for these reasons. "If I lived in Kirkuk," General Garner said, "I know how I'd vote."

The first panel of the conference, "Article 140 and the Iraq Constitution," included Ambassador Peter Galbraith, Joe Reeder, Jason Gluck, and Professor Brendan O'Leary, and was chaired by Dr. Karim.

Ambassador Galbraith, a fellow at the Center for Arms Control and Non-Proliferation, described his first visit to Iraqi Kurdistan in 1987 with the realization that "villages simply weren't there," and his consequent education about the Kurds. On the subject of Kurdistan's status, Ambassador Galbraith said that it is an independent country in every regard except in terms of international recognition, and cited the articles of the Iraq Constitution that enshrine Kurdistan's de facto independence. He affirmed that the only place in Iraq where American alliances in Iraq overlap with democracy is in Kurdistan, which he qualified as imperfect but pluralistic.

On the subject of Kirkuk, Ambassador Galbraith said that the Kurdistan Regional Government (KRG) has made a point of giving all parties a political voice and recognizes the degree of diversity in Kirkuk. The issue of Kirkuk has been a source of dispute since 1921, he said, and emphasized the necessity of a system for solving the problem. Ambassador Galbraith criticized policy-theorists, the International Crisis Group in particular, who have urged the postponement of the referendum. He described Kirkuk's ratified unification with the KRG as sensible and inevitable. Meaningful power-sharing once this happens, he said, should include an allowance for all groups to have their own schools, the right of assembly, security responsibility devolved to neighborhoods, and super majorities on Kirkuk's governing council. Ambassador Galbraith said there was great receptivity to these ideas and that, after 80 years, the problem of Kirkuk could be solved. Postponing the referendum, he concluded, is "the height of irresponsibility," and not in the interest of the Middle East's long term stability.

Joe Reeder, former Undersecretary of the United States Army, began his remarks by describing the challenges of implementing Article 140 as momentous, with the factors to take into account including justice, self-determination, fairness, and stability. The extended June 30, 2008 deadline will not be met, Reeder said, because of two main challenges: the inherent difficulty of political line drawing and the ambiguity of Article 140. He added that the drawing of geographical boundaries is always contentious, which he illustrated with maps of gerrymandered U.S. congressional

districts, and compared other examples of the American experience in messy democracy.

Mr. Reeder described the United Nations Assistance Mission to Iraq (UNAMI) plans to resolve the disputed areas from Sinjar to Diyala province, and assessed that compromise will be part of the process. He compared the situation to tensions in Kosovo, and said that drawing lines comes down to villages and houses, with the biggest winners being those that are committed to the rule of law and good governance. While describing Article 140 as unclear in regard to areas eligible for a referendum, he characterized the argument that Article 140 is null and void -- due to the passage of the original deadline -- as "ludicrous in law and logic," on the grounds that the constitution would have to explicitly state such an abrupt reversal. Mr. Reeder said his most important advice to all parties was "be nice." The future looks messy but good for the Kurds, he said, since people are voting with their feet by migrating to Kurdistan and the absence of U.S. casualties is the region's biggest asset.

Jason Gluck, a rule of law advisor for the U.S. Institute of Peace, offered an opposing viewpoint by advocating a political compromise outside of Article 140. With the original deadline past, Mr. Gluck said, "there is no longer a constitutional obligation for Iraq to hold a referendum on Kirkuk or any other of the disputed territories." He added that there was no purely legal solution and pointed to Article 140 as incomplete, citing questions on voter eligibility and residency requirements.

Mr. Gluck said that a referendum will not be accepted by the losers, positing that the result would be increased tension and violence. He cited the opposition to a referendum by Arab leaders and Al Qaeda in Iraq, evidenced by their move of operations from Anbar to Ninevah province. Mr. Gluck also argued against Article 140 on the grounds of regional opposition by Turkey, Syria, and Iran. He reemphasized that an additional political agreement is necessary, and he suggested a number of concessions that the KRG could offer, including relinquishing the right of oil management and revising the supremacy of regional law over federal law.

Professor Brendan O'Leary, Director of the Penn Program and Lauder Professor of Political Science, responded in disagreement with the remarks of Mr. Gluck. Political

agreement is desirable but it is not necessary to have a comprehensive agreement before Article 140 is implemented, and it would be wrong to hand out veto powers that are not in Iraq's constitution, he said. Prof. O'Leary emphasized that Article 140 is a critical element of Iraq's constitution, and that Kurdistan would not have endorsed the constitution without its inclusion. He added that the KRG can pursue lawful options if the federal government will not fulfill its constitutional obligation.

Prof. O'Leary then addressed four misleading cliches about Kirkuk. First, he refuted the theory of an 'oil grab' by Kurds in Kirkuk by citing the key constitutional provisions that ensure that all oil revenue from already exploited fields will be distributed through Iraq, regardless of its location. He showed a 1919 Treaty of Versailles map with Kirkuk inside of Kurdistan, proving that Kurdish interest in Kirkuk predates the knowledge of oil. Through the use of maps and data he documented Saddam's injustices in Kirkuk -- coercive Arabization, expulsions and boundary manipulation. Second, arguing against the description of Kirkuk as 'powder-keg,' Prof. O'Leary said that unification through due process would not precipitate an increase in violence as long as sufficient security was maintained, provided that the losing nationalities were well-protected -- and pointed to explicit attempts by the KRG to propose power-sharing and political provisions for minorities in Kirkuk. He commended the inclusion of such measures in Kurdistan's regional constitution. Third, he contested the thesis that a Turkish invasion would follow Kirkuk's unification with the KRG. He suggested the impossibility of this scenario if Turkey intends to pursue its candidacy as member of the European Union. He also argued that the Turkish elite know that an occupation of Kirkuk would be a recipe for a long-term disaster. Turkey has considerable interest in a mutually productive relationship on its borders with the KRG, he said. Last, he tackled the conjecture that Kurdistan is planning to declare independence in the immediate future, arguing that while all Kurds undoubtedly wish for their own state, Kurdistan and its leaders have little to gain and lots to risk in this gesture.

Prof. O'Leary said that the idea of postponement as a means to stability in Kirkuk was mistaken -- any further delays would cause instability, he said. Prof. O'Leary argued that the international community should instead focus on facilitating a fair referendum process, where necessary, encouraging the KRG to confirm constitutional commitments to protect minority nationalities, and encouraging the minority nationalities to engage with the KRG on that agenda.

Dr. Kamal Kirkuki, Deputy Speaker of Parliament in the KRG, said that Article 140 is a less complicated issue than often thought, arguing that while the disputed territories are part of Kurdistan, only their administration will be decided by Article 140. Dr. Kirkuki emphasized the rights of the majority as well as the minority, using the example of minority rule during Iraq's rule by Saddam Hussein, and expressed his support for federalism as the only solution supported by the constitution. Dr. Kirkuki also said that Kurds simply "want to remember" the injustices of the regime in Kirkuk and to correct them, and referred to a series of maps of the Kurdish population before the tampering of the Baathist regime.

Dr. Mohammad Ihsan, Minister for Extra-Regional Affairs in the KRG, spoke about the issue of demographics and past Iraqi government policy to shift them toward Arab majorities. In addition, a policy of 'correcting nationality' meant that Kurds were forced to declare themselves Arabs, he said. Dr. Ihsan discussed the United Nations Assistance Mission for Iraq's (UNAMI) role in setting internal boundaries and gave examples of boundaries being redrawn in other countries, including India, Nigeria, Switzerland, Canada, and the United States. Dr. Ihsan argued that boundaries could be redrawn successfully in Iraq, provided that there is rule of law, tolerance, and defined power-sharing.

Dr. Kendal Nezan, President of the Kurdish Institute of Paris, mainly spoke about the concerns of neighboring countries regarding Article 140. Dr. Nezan said that Iran and Syria are dissatisfied with the developments in Iraq Kurdistan because of their own marginalized Kurdish populations, but the U.S. does not take account of these concerns. The United States does, however, consider the concerns of Turkey, where the Kurdish issue remains unresolved, he said. Dr. Dr. Nezan urged the United States to address the moral responsibility of Kurdish issue and its history. He also argued that Iraq's constitution is not simply a piece of paper -- it is the only political agreement for the new democratic Iraq, he said. If the conditions of the constitution are not met, Dr. Nezan said, Kurds have no reason to remain part of the country.

Dr. Saman Shali, President of the KNC, said that Iraq's constitution was endorsed by United Nations, the U.S., and Iraq, and that Article 140 provides the people who live in disputed territories freedom to "choose their destiny." Dr. Shali urged the U.S. to use its authority to implement Article 140, but stressed that the responsibility lies with all parties within Iraq to resolve the situation through the constitution. He stressed that

a failure to implement Article 140 would be a great injustice, and would restart the cycle of mistrust between Kurdistan and governments in Baghdad.

The second panel discussion, "Reconciliation and Power-sharing," included David L. Phillips, Ambassador David Berger, Erin Mathews, David Pollack, and Qubad Talabani. Prof. O'Leary chaired this discussion.

David L. Phillips, a visiting scholar at Columbia University's Center for the Study of Human Rights, described reconciliation as a long process, and said that power-sharing is essential to preventing violent recourse. He listed the technical issues under international law that are associated with minority rights, addressing governance, economy, culture, assembly, security, media, freedom of movement, language, and education. Mr. Phillips emphasized the importance of the draft process for a KRG constitution and the inclusion of minority rights provisions, arguing that it would reassure its citizens and prepare for all the future possibilities, including the breakup of Iraq, where Kurdistan would already have a system in place for democratic self-governance.

Erin Mathews, director of Iraq programs at National Democratic Institute (NDI), spoke about NDI's projects at the community level in Kirkuk and the challenges faced on a local level. Ms Mathews said that citizens felt powerless in regard to the governance of Kirkuk and tended to have no second choice in their party of preference. She emphasized NDI's efforts to poll citizens and to determine solutions for inclusive and effective governance in Kirkuk.

Ambassador David Berger, a former Canadian ambassador and MP, spoke about the experience of "ethnic and religious conflict of an unprecedented scale in the 20th century," citing the partitioning of India and Pakistan, and juxtaposing this with a draft of the Universal Declaration of Human Rights. He emphasized federalism -- American in principle and Canadian in practice -- as the means for people of different backgrounds to live together in one state. Ambassador Berger also said that Kurdistan has established a new trend in representation for minorities in Iraq, with a stark contrast to the old Iraq, and suggested that the KRG should initiate power-sharing in

detailed terms that reaches accommodation beyond the Canadian model. He called Kurdistan's experience "the beginning of a new direction in the Middle East."

David Pollock, a fellow at the Washington Institute for Near East Policy, described his recent trip to Kurdistan and offered that Article 140 is only one aspect of the broad issue of reconciliation and the larger issue of power sharing between Kurds and Arabs, as well as reconciling Iraq and its neighbors. Dr. Pollock said that from a legal and historical perspective, Article 140 should be applied, though he argued that the more important question was "what works?" in the pragmatic point of view. With regard to Iraq's neighbors, he urged greater cooperation between the Kurds and the Turks to eliminate the PKK, which he said would make Turkey more inclined to help. Within the KRG, Dr. Pollock cited the need to improve press freedoms, based on instances of newspaper editors that face charges for publishing criticisms of the government. Finally, Dr. Pollack argued that Kirkuk is about making compromises and warned with the example of Pakistan and Kashmir as the destructive outcome to avoid for Kurdistan and Kirkuk.

Qubad Talabani, KRG Representative to the US, said that there has not been enough dialogue about the issue of disputed territories and that the KRG ultimately wants a sustainable, just resolution. There can be no justice or national reconciliation without rectifying the wrongs committed during the previous regime, Mr. Talabani said. In Iraq, he said, defensive posturing becomes offensive and the pain caused by the past creates further obstacles. The KRG must show good governance, Mr. Talabani said, and it is working on developing a culture of better governance. "We are not Switzerland – yet," he said, and offered that the KRG needs to campaign to convince people in the disputed areas that "Kurdistan can govern you better than Baghdad." He emphasized that the KRG aims to govern all of its citizens without regard to ethnicity or identity, and assured that it will "be nice," affirming Mr. Reeder's comment earlier in the day.

The third panel discussion, "History and Current Situation" included Dr. Kirkuki, Dr. Ihsan, and Dr. Karim. Dr. Shali chaired the panel.

Dr. Kirkuki said that people naturally live together in Kirkuk and the situation does not simply equal Kurd versus Arab, and argued that the KRG has dialogue with a wide variety of groups in Kirkuk. He said that human rights was the crux of the issue and noted the number of Christian families in Kurdistan as evidence of their rights. Dr. Kirkuki also said that the KRG is trying to have good relations with Turkey and Iran and that “we don’t need to fight with our neighbors.” Finally, he noted that Iraq’s unity depends on respect for the constitution.

Dr. Ihsan said that the situation significantly was better than many people assumed, arguing that the historical conflict lies between the Kurds and central government, not the various ethnic groups despite problems of trust. Citing his work on repatriation committees, Dr. Ihsan said that Arabs and Kurds are both returning home peacefully, and that slow, forward progress is being made. \$275 million has thus far been spent on compensation, he added.

Dr. Karim said that the KRG should improve its efficiency and emphasized its preparation for future challenges. He also described the concerns of unequal Kurdish language rights, and trends toward a centralized government in Baghdad, including threats by the oil minister. Dr. Karim urged the KRG leadership to use all of its influence in the coming years to prevent a regression into Iraq's old methods.

The consensus of the convening experts: Article 140 should be duly implemented with protection for rights of minorities through due process and political compromise.

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